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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY, Debtor

NO. 359

PHILADELPHIA COMPANY, Petitioner,

v.

JULES GUGGENHEIM ET AL.

NO. 360

PHILADELPHIA COMPANY, Petitioner,

v.

CITY OF PITTSBURGH

NO. 361

PHILADELPHIA COMPANY, Petitioner,

v.

HORACE F. BAKER and JOHN A. BLATTIE, Protective Committee for Southern Traction Company 50-Year First Mortgage and Collateral Trust 5% Gold Bonds

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Philadelphia Company, owner of all of the capital stock of the above-named debtor, the principal creditor of the debtor, and an appellee in the Circuit Court of Appeals, prays that writs of certiorari issue to reverse the orders of the United States Circuit Court of Appeals for the Third Circuit entered in the above-entitled case.

OPINIONS BELOW

The Report of the Special Master appears at pages 604 to 838 of the record. The opinion of the District Court for the Western District of Pennsylvania appears at pages 133 a to 151 a of the record and is reported at 60 F. Supp. 600. The opinion of the Circuit Court of Appeals is printed at pages 939 to 952 of the record and is reported at 155 Fed. 2d. 477.

The orders of the Circuit Court of Appeals were entered on May 7, 1946 (R. 952-954). A petition for clarification of the Circuit Court's opinion and orders was filed on June 11, 1946 by the Trustee of the debtor. This petition, which appears at pages 955 to 964 of the record, was denied without opinion on June 28, 1946 (R. 970).

JURISDICTION

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U.S.C.A. 347). Section 240(a) is rendered applicable to appeals in bankruptcy reorganization proceedings by Section 121 of Chapter X (11 U.S.C.A. 521) which in turn makes reference to the Bankruptcy Act (cf. Section 24(c); 11 U.S.C.A. 47).

STATUTES INVOLVED

Chapter X, Bankruptcy Act of 1938:

Sec. 111. "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located." (11 U.S.C.A. 511)

Sec. 115. "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature." (11 U.S.C.A. 515)

Sec. 216. "A plan of reorganization under this chapter

* * * * * * * *

(2) may deal with all or any part of the property of the debtor;" * * * (11 U.S.C.A. 616)

QUESTIONS PRESENTED

In a proceeding instituted under Section 77B of the Bankruptcy Act, where a petition for reorganization has been filed by a street railway company which has operated the properties of so-called underlier or lessor street railway companies, some of which are non-affiliates and others are subsidiaries or affiliates of the debtor; and where such operations have been conducted by the debtor for the most part pursuant to operating agreements which have been held by the Supreme Court of the State to pass no title to the debtor; and where none of the underliers is the subject of a petition for reorganization, the questions are:

1. Does the Court have jurisdiction to treat the property of the underliers as "property of the debtor" within the meaning of the Bankruptcy Act, and to include such property in a plan of reorganization contemplating the merger and unification of all of the companies?

2. Does the court have jurisdiction (in the words of the Circuit Court of Appeals, R. 943) to pull "into the organization, willy-nilly" the lessor corporations of the debtor?

3. May the Court ignore corporate entities as between the debtor and its lessor corporations when the latter are either (a) publicly controlled non-affiliates of the debtor, or (b) affiliates of the debtor, i.e. subsidiaries of a common parent, or (c) subsidiaries of the debtor, the voting control of which has passed out of the debtor into an indenture trustee?

4. May the property of lessor street railway companies, operated under operating agreements which are

valid under state law and which have been held by the Supreme Court of the State to pass no title to the debtor, be administered as part of the property of the debtor?

5. May the Court bring into the reorganization proceedings and administer their property as property of the debtor, underlier or lessor corporations as to which there is no finding of insolvency or inability to pay their debts as they mature?

6. May the Court administer as though it were property of the debtor the property of the lessor or underlier corporations of the debtor, when the Supreme Court of the United States has declared in a prior case arising out of the same reorganization proceedings that (in the words of the prior case, *Philadelphia Co. v. Dipple,* 312 U.S. 168, 173) "none of the lessor or underlier companies is in reorganization"?

STATEMENT

1. The Nature of the Proceeding

This case arises out of the corporate reorganization proceedings of Pittsburgh Railways Company, and presents the problem of the extent to which the reorganization court may assume jurisdiction over, and deal with in a plan of reorganization, the lessor or underlier companies of the debtor, where none of the underliers has filed, or has had filed against it, a petition for reorganization.

The subject of the present litigation is a petition by the City of Pittsburgh (R. 40 a to 83 a) which seeks to have the Bankruptcy Court assume jurisdiction to deal

with the property of the underliers as fully as if either they were the properties of the debtor or as if the underliers were being reorganized in this proceding (Cf. R 814; SMR 1051).[1] The prayer of the City's petition (R. 75 a) is as follows:

> "(1) That this Court forthwith assume and exercise jurisdiction over all the properties and assets, or interests therein, of each of the Underliers, or so much thereof as may be actually or constructively in the custody of this Court; and hear and determine, as part of plan hearings under Section 169 of the Bankruptcy Act, the respective substantive rights, priorities, liens, claims and interests of all the creditors and stockholders of all the Underliers, as persons having claims against or interests in the Debtor or its properties or portions thereof, taking cognizance of all rights and equities existing in favor of any creditors or stockholders as against any others; and classify such creditors and stockholders for the purpose of the plan and its acceptance, according to the nature of their respective claims and interests."

The City's petition was considered in an exhaustive report by a Special Master, who recommended its dismissal (R. 837). The District Court adopted the Master's findings and recommendation (R. 148 a). On appeal

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[1] The abbreviation "R" followed by a numeral, is used herein to refer to *pages* of the Transcript of Record.

The abbreviation "SMR", followed by a numeral, is used herein to refer to *paragraphs* of the Special Master's Report, which appears at pages 604 *et seq.* of the Record.

[1], the Circuit Court likewise adopted the Master's findings, characterizing his report as "full and complete and most carefully done" (R. 943), but reversed the District Court as a matter of law (R. 952).

2. The Companies Involved

Pittsburgh Railways Company is the sole debtor in the case. On May 10, 1938, it filed a voluntary petition for reorganization under Section 77B of the Bankruptcy Act. For many years prior thereto, it had possessed and used the properties of numerous underlier street railway companies and had operated those properties, in connection with its own, as a unified railway system in Pittsburgh, Pennsylvania and surrounding territory. Of the total track mileage of 530 track miles operated by it, Pittsburgh Railways Company owns 34 (R. 659, SMR 201, 202). The remainder of the trackage is owned by lessor or underlier companies.

Philadelphia Company owns all of the stock of Pittsburgh Railways Company. Philadelphia Company also owns the stock of corporations furnishing gas and elec-

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[1] Three separate appeals were taken to the Circuit Court of Appeals, bearing the following numbers in that Court:

Jules Guggenheim, et al.— No. 8964

City of Pittsburgh, et al.— No. 8967

Horace F. Baker and John A. Beattie, Protective Committee, for Southern Traction Company 50-Year First Mortgage and Collateral Trust 5% Gold Bonds—No. 8996

Although a single opinion was written, the Circuit Court entered a separate order of reversal on each appeal.

tric service in the City of Pittsburgh and surrounding territory, and is a public utility holding company subject to the Public Utility Holding Company Law. It owns the stock of some of the underlier or lessor corporations of Pittsburgh Railways Company (R. 615, SMR 17, 25) Other underliers, however, are publicly controlled.

The underlier companies may be classified according to their stock relationship to the debtor, as follows (R. 650, SMR 158; R. 846):

13 *publicly controlled companies* having a total of 132 miles of track. A majority of the stock of each of these companies is and always has been controlled by public holders having no connection with Philadelphia Company or Pittsburgh Railways Company.

10 *affiliates of Pittsburgh Railways Company* having a total of 88 miles of track. These companies are subsidiaries of Philadelphia Company, but not of Pittsburgh Railways Company.

26 *subsidiaries of Pittsburgh Railways Company,* having a total of 251 miles of track.

3. Unified Operation, 1902 - 1938

The laws of Pennsylvania have long authorized the execution of leases and operating agreements among street railway companies (R 826, SMR 1072) with no suggestion that such leases would amount to conveyances, or would result in a destruction of the corporate entities of lessor and lessee. Pursuant to this statutory authority, all of the leases in the present case were executed, most of them prior to the time when Pittsburgh Railways Company or Philadelphia Company had any

interest in the street railway business (cf. R. 639, SMR 92).

Immediately prior to 1902 there were six separately operated street railways systems in Pittsburgh and vicinity (R. 632, SMR 62 *et seq.*). Philadelphia Company had recently acquired stock control of three of these, namely:

1. Pittsburgh Railways Company (then called Southern Traction Company)
2. Consolidated Traction Company
3. United Traction Company of Pittsburgh.

The three remaining systems were, and still are, publicly controlled (R. 650, SMR 158). These are the so-called "guaranteed" underliers (R. 609, SMR 1), namely:

4. Monongahela Street Railway Company
5. The Suburban Rapid Transit Street Railway Company
6. Pittsburgh and Birmingham Traction Company.

Each of these six companies had brought together for unified operation the property of lessor or underlying companies. The operating company was the owner of a majority or all of the stock, directly or indirectly, of its lessors, except that Consolidated Traction Company operated the property of four lessor companies which were then, and still are, publicly controlled (R. 650, SMR 158). These are the so-called "unguaranteed" underliers (R. 609, SMR 1) namely:

The Citizens Traction Company and subsidiary, and Allegheny Traction Company and subsidiary.

As of January 1, 1902, long-term leases were executed by the so-called "guaranteed" underliers to United and Consolidated. Separate leases ran from Monongahela and Suburban to Consolidated, and a lease ran from Birmingham to United (R. 641, SMR 106, 109). Philadelphia Company, by guaranty attached to each of the leases, guaranteed the payment of the rental and the faithful performance of the covenants of the lessees (R. 641, SMR 111). Hence the description of Monongahela, Suburban and Birmingham as "guaranteed" underliers.

Consolidated (thus enlarged by leases from Monongahela and Suburban) and United (thus enlarged by lease from Birmingham) then executed separate operating agreements effective January 1, 1902 with Pittsburgh Railways Company (R. 654, 655; SMR 164, 166). Pursuant to these operating agreements all of the properties in the Consolidated Traction and United Traction systems came into the possession of Pittsburgh Railways Company for operation.

These two systems comprise more than 75% of the property of the underliers covered in the City's petition, their mileage being as follows (cf. R. 665 *et seq.;* SMR 205, 206; R. 846):

Consolidated and lessors—	195 miles.
United and lessors—	209 miles.

The operating agreements, pursuant to which the properties of Consolidated and United have been operated by Pittsburgh Railways Company since 1902, were for an original term of five years, terminable on 3 months' notice (R. 654, SMR 164, 166). They provide

that Pittsburgh Railways Company shall "maintain and operate " [1] the property.

In addition to the operating agreements, Pittsburgh Railways Company had received in 1901 a long-term lease covering 49 miles of track from its subsidiary, West End Traction Company (R. 655, 666; SMR 170-172, 206). Several new companies executed leases or agreements to the debtor or to an underlier after 1902 (R. 643, SMR 131 *et seq.*). These post-1902 companies, however, make up a relatively small portion of the track of all the companies (R. 666, SMR 206). After allowance for proposed abandonments, the total trackage of the post-1902 companies totals only 54 miles.

Since 1902 all of the property of Pittsburgh Railways Company and the underlier companies has been operated by Pittsburgh Railways Company as a unified street railway system, pursuant to the leases and operating agreements above referred to (R. 667, SMR 211 *et seq.*).

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[1] This language has been construed by the Supreme Court of Pennsylvania to pass no title to Pittsburgh Railways Company (*Second Ave. Traction Company v. United Traction Company of Pittsburgh,* 328 Pa. 257, 195 A. 25 (1937).

4. Reorganization Proceedings of Pittsburgh Railways Company, 1938 to Date

On May 10, 1938, a voluntary petition for reorganization under Section 77B of the Bankruptcy Act was filed on behalf of Pittsburgh Railways Company (R. 613, SMR 1). The petition stated that "the greater portion of the system is not directly owned but is operated by the debtor by virtue of numerous long-term leases and operating agreements and stock ownership" (R. 613, SMR 2).

The Trustees of Pittsburgh Railways Company continued to operate the property of the underlier companies, but have neither affirmed nor disaffirmed the leases and operating agreements of those companies. They have refused to make any payments of rental to the underliers, and no allowances for use and occupancy have been made. Consequently, no payments have been made on the securities of the underliers (with the exception of the "guaranteed" underliers) since 1938. The "guaranteed" companies, however, have compelled Philadelphia Company, pursuant to its guaranties of the leases of Consolidated and United, to pay the full amounts due under their leases (R. 619, SMR 32, 33). As a result, the "guaranteed" underliers are able to pay their debts as they mature (R. 631, SMR 57). All of the remaining underliers are unable to pay their debts as they mature, with the exception of six companies which were not shown to have any indebtedness (R. 631, SMR 55).

Early in the reorganization proceedings the question arose whether the debtor should pay taxes on property of the underlier companies. This question was answered

in the negative by this court in *Philadelphia Co. v. Dipple,* 312 U.S. 168, 61 S. Ct. 538, where this court said that (312 U.S. at 173) "* * * none of the lessors or underlying companies is in reorganization".

The Trustees of the debtor nevertheless prepared a plan of reorganization which contemplated that all of the companies in the system were to be brought together into a single company by a merger "pursuant to the applicable provision of the Acts of General Assembly of the Commonwealth of Pennsylvania." (R. 613, SMR 7). The plan did not contemplate that the corporate entities of the underlier companies would be ignored, but stated, to the contrary, that following the unification of operation "the separate corporate entities of the component companies were preserved" (R. 792, SMR 810).

The Trustees' plan provided that petitions for reorganization would be filed, not by all of the underlier companies, but only by twenty-five companies whose creditors and stockholders were "so many in number and so widely scattered, their unanimous acceptance of the plan cannot be anticipated." (R. 614, SMR 8).

The Pennsylvania Public Utility Commission, after rejecting certain features of the plan (38 P. U. R. (N. S.) 434; 41 P.U.R. (N.S.) 193) gave its approval to the "Amended Revised Plan" (42 P. U. R. (N. S.) 285). The Commission was not called upon to consider whether the separate operation of any of the underlier companies, or of any group of them, was physically or financially practicable, or in the public interest.

On May 23, 1942, shortly after filing their plan of reorganization on March 17, 1942, the Trustees filed a petition for a rule to show cause why twenty-five named underlier companies (those having widely scattered se-

curities) should not file voluntary petitions for reorganization (R. 614, SMR 10). In response to the Trustees' rule, six of the "guaranteed" underliers moved to dismiss the petition and none of the companies consented unconditionally to file petitions for reorganization (R. 614, SMR 11). The City of Pittsburgh then filed the petition which is the subject of the present litigation (R. 614, SMR 12).

5. The Special Master's Findings

Within the limited space of this petition, it is impossible to do more than to record a few of the more important of the Special Master's detailed findings in support of his conclusion that the City's petition should be dismissed.

The Master outlined in detail the history of the companies, and described their activities (R. 782, SMR 783-901). He further set forth the numerous instances in which the underliers had been recognized as separate corporations (R. 789, SMR 801-820).

With respect to the contention by the City that the property of the underliers and the debtor had been inextricably commingled and confused, he found that records of property had been maintained (R. 743, SMR 561-564), and concluded that "there appears to be no serious difficulty in distinguishing the debtor's property from the properties of the underliers" (R. 825, SMR 1069).

As to the accounting practices of the companies, the Master found, in the case of United and Consolidated, that there was no indication that the property originally taken over for operation by Pittsburgh Railways Com-

pany in 1902 became the property of Pittsburgh Railways Company (R. 682, SMR 301). Nor does the accounting indicate that Pittsburgh Railways Company became the owner of all the property which was added to the system after 1901 (R. 697, SMR 365).

On the question of the practicability of separate operation by the underliers, the Master found that in the event of the termination of the operating agreements running from United and Consolidated, respectively, to the debtor (and the consequent breaking of the unified operation into three separate systems, i.e., Consolidated, United and Pittsburgh) the separate operation of each of the resulting three systems would be practicable, (R. 777 *et seq.*, SMR 751, 753) but that financial difficulties would be encountered (R. 778, SMR 754). The Consolidated Traction Company System, however, would be in a much stronger financial position than would United or Pittsburgh (R. 773, SMR 731-733).

As previously noted, the Master's findings and recommendation were adopted by the District Court (R. 148 a).

6. The Circuit Court of Appeals' Decision

The Circuit Court of Appeals said (R. 943) that the question in this case "relates to the power of the court to grant the city's petition by pulling into the organization, willy nilly, the underliers." This question was answered in the affirmative, on the ground that the corporate entities of the underliers should be ignored. The Court was not deterred by the fact that it had previously held, as to these very same companies,

that corporate entities should not be ignored.[1] Referring to the concept of the "corporate veil", it said (R. 949):

> "We think a more accurate figure is that of a cloak which on some occasions is to be worn and on other occasions is to be stripped off."

The Trustee of the debtor filed a petition for clarification of the Circuit Court's Opinion. This petition raised the questions, in effect (R. 958): Are the underliers debtors in reorganization? If they are not, is the legal title to their property vested in the debtor, Pittsburgh Railways Company? If the legal title to the underliers' property is not vested in the debtor, is such property nevertheless to be dealt with for the purposes of a system-wide reorganization as if property of the debtor? The Circuit Court of Appeals denied the Trustee's petition for clarification without opinion (R. 970).

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[1] *In re Reorganization of Pittsburgh Railways Co.*, 111 F. 2d 932, 934 (affirmed, *Philadelphia Co. v. Dipple*, 312 U. S. 168, 61 S. Ct. 538), the Circuit Court had said, as to the same companies:

> "Neither the past history of the system nor the present state of the reorganization proceedings would, we think, justify our ignoring the existence of the separate legal entities which compose that system."

REASONS FOR GRANTING THE WRITS

The decision of the Circuit Court of Appeals should be brought to this Court for review, for the following reasons:

1. It is in conflict with:
   a) The decision of this Court (*infra,* p. 18),
   b) The decision of the Third Circuit in a prior case (*infra,* p. 19),
   c) The decisions of the Supreme Court of Pennsylvania (*infra,* p. 19), and
   d) The established practice in railroad reorganizations (*infra,* p. 21).

2. It presents important questions which have not, but should be, decided by this Court. These questions relate to:
   a) "Factual unity" as a basis for the exercise of bankruptcy jurisdiction (*infra,* p. 22),
   b) The disregard of corporate entities (even as between non-affiliated corporations) in reorganization proceedings (*infra,* p. 24),
   c) The status and validity of leases in reorganization proceedings (*infra,* p. 25), and
   d) The disregard of State law by bankruptcy courts (*infra.* p. 26).

Each of these reasons will be separately considered.

1. THE CIRCUIT COURT'S DECISION IS IN CONFLICT WITH OTHER DECISIONS

(a) Conflict with this Court

In a prior case arising out of the same reorganization proceedings and relating to very same companies, this Court held in *Philadelphia Co. v. Dipple,* 312 U. S. 168, 61 S. Ct. 538, that the Trustees of the debtor, Pittsburgh Railways Company, should not pay the taxes assessed against its underlier or lessor corporations. In reaching its conclusion this Court said (312 U. S. at 173):

> "* * * in the present instance, none of the lessors or underlying companies is in reorganization."

It further said (312 U.S. at 175), with reference to the business of underliers:

> "that business is not the business of the Pittsburgh Railways Company and the trustees are not the trustees of any such business".

The opinion of the Circuit Court of Appeals, we submit, is squarely in conflict with the Dipple case. If the property of the underliers may be administered as if they were in reorganization, the taxes on their property should have been paid all the while, and the Dipple case is wrong.

Furthermore, although the record in the Dipple case is not the same as the record in this case, all the facts which the Circuit Court stresses in reaching its decision in the present case (R. 946) were before it and before this Court in the Dipple case. Indeed, when the Circuit Court undertakes to consider the particulars of the case, it supports its statements with several cita-

tions of the opinion of this Court in the Dipple case (R. 946).

(b) Conflict With Prior Decision in Third Circuit

We have already noted that when the Dipple case was before the Third Circuit, that Court expressly refused to ignore the corporate entities of the underliers (*supra*, p. 16, note [1]). In the present case, on the other hand, it reaches precisely the opposite result. We submit that the Third Circuit is in conflict with itself.

(c) Conflict with Supreme Court of Pennsylvania

The opinion of the Circuit Court of Appeals is in conflict, not merely with general principles laid down by the Supreme Court of Pennsylvania, but with specific applications of those principles to the very same corporations which are the subject of the Circuit Court's opinion.

In *Second Avenue Traction Company v. United Traction Company of Pittsburgh*, 328 Pa. 257, 195 A. 25 (1937), the Supreme Court of Pennsylvania specifically held, with respect to the operating agreement from United Traction Company of Pittsburgh to Pittsburgh Railways Company that (328 Pa. at p. 259):

> "The agreement * * * was not a conveyance to Pittsburgh Company of any title of United Company in the railway lines. It was merely an agreement by which United Company turned over *possession* of the lines to Pittsburgh Company for the purpose of operation" [Italics by the Court].

Notwithstanding this decision, the Circuit Court of Appeals now rules that the property operated pursuant to

this agreement may be dealt with in the reorganization proceeding of Pittsburgh Railways Company.

In another case, *Ambridge Borough v. Philadelphia Company,* 283 Pa. 5, 129 A. 67 (1925), the Supreme Court of Pennsylvania specifically refused to ignore the entity of a street railway subsidiary of Philadelphia Company, whose status closely resembled that of the underliers in the present case. In the Ambridge case, the Court said of Philadelphia Company (283 Pa. at pp. 10, 11):

> "Its stock ownership gives it the right and the power to elect directors of its own choosing, and in this way it is undoubtedly able indirectly to impose its will in matters of management and control; *nevertheless, both subsidiary companies own their own property and franchises and their respective boards of directors are in direct management of their affairs.*" [Italics supplied].

In spite of this decision, the Circuit Court of Appeals now disregards the entities of other underliers, similarly situated.

There are other decisions of the Supreme Court of Pennsylvania which, although not involving the same companies as the present case, announce principles in conflict with the decision in this case. In *Dalton Street Railway Co. v. Scranton,* 326 Pa. 6, 191 A. 133 (1937), the Court expressly recognized the ownership of property by a lessor street railway company. In *Com. ex rel. Margiotti v. Union Traction Co.,* 327 Pa. 497, 194 A. 661 (1937) in refusing to forfeit the franchises of lessor corporations, it recognized their ownership of property. And in *Third National Bank v. Lehigh Valley Coal Co.,* 353 Pa. 185, 44 A. 2d. 571 (1945) it acknowledged the

right of a lessor to reclaim leased property in a reorganization having many points of resemblance to the instant case.

(d) Conflict with Practice in Railroad Reorganizations

The Interstate Commerce Commission, in dealing with the reorganization of railroads under Section 77 of the Bankruptcy Act, has uniformly given effect to leases of railroad properties and to corporate entities of lessors in situations comparable to the present case. In an important reorganization (*Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 239 I.C.C. 485, 534, 535) the Commission expressly refused to treat as property of the debtor, the property of a lessor company, even where 97% of the lessor's stock was owned by the debtor, its bonds were guaranteed by the debtor, and the lessor was a deficit line which could not have been profitably operated by the lessor as a separate operation. The result reached in the Milwaukee case was approved in this Court, although the question whether the Commission could have treated the properties of the lessor as part of the properties of the debtor, was not here raised. *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U.S. 523, 546, 63 S. Ct. 727, 741 (1941). The precedent of the I.C.C. decision in the Milwaukee case was followed in the receivership of the Seaboard Air Line Railway Company (R. 831, SMR 1077).

In addition there are numerous cases illustrating the well-established practice, especially in railroad and street railway reorganizations, of making a clear distinction between leased property and owned property.

We cite the following as examples which could be multiplied many times. *Palmer v. Connecticut Railway and Lighting Co.*, 311 U.S. 544, 61 S. Ct. 379 (1941); *Thompson v. Texas Mexican Ry. Co.*, 324 U.S. 838, 66 S. Ct. 937 (1946); *Smith v. Hoboken R.R. Warehouse & S.S. Conn. Co.*, ... U.S. ..., 66 S. Ct. 947 (1946); *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 F. 721 (2 Cir., 1912); *American Brake Shoe & Foundry Co. v. New York Railways Co.*, 293 F. 633 (2 Cir., 1923); in re *Chicago Rapid Transit Co.*, 129 F. 2d 1 (7 Cir., 1942).

2. THE CIRCUIT COURT'S DECISION PRESENTS IMPORTANT QUESTIONS WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

The Circuit Court of Appeals has itself characterized the problem presented by this case as "very important" (R. 943). Furthermore, as the Circuit Court acknowledged, there is no judicial precedent squarely in point which would justify the result which it reached (R. 950).

(a) "Factual Unity" as a Basis for the Exercise of Bankruptcy Jurisdiction

The Circuit Court of Appeals holds, in effect, that bankruptcy jurisdiction may be extended to any corporation having "factual unity" with the debtor. This may be accomplished by the device of ignoring corporate entities as between a debtor in bankruptcy and another corporation over which bankruptcy jurisdiction is to be assumed. In the present case this is accomplished in these words (R. 951, 952):

> "We think that the many years of factual unity and the public necessity for the measures which will insure the proper economic foundation for the system, override the arguments for the recognition of the legal concept of separate entity on the part of the underliers."

The "factual unity" to which the court refers is a unity which was the result of leases duly executed by separate corporations pursuant to state law. The "unity" of a lease is converted into the unity of a merger, and the corporate entities of lessors and lessees are ignored. The "system" which is to have a "proper economic foundation" consists of several corporations, some of which are entirely able to pay their debts as they mature, others of which do not appear to have any debts, and none of which has been the subject of voluntary or involuntary petitions for reorganization. The result is that corporations which, as individuals, do not meet the requirements of bankruptcy reorganization, are treated as debtors in reorganization because they are considered to be parts of a "system" composed of several corporations which, in the aggregate, do not have a "proper economic foundation."

If bankruptcy jurisdiction may be predicated on the need for "proper economic foundations" on the part of "systems" (comprised of corporations having "factual unity"), we have a most startling and important innovation in bankruptcy law. Does the bankruptcy power of the Constitution (Art. I, sect. 8) authorize the exercise of bankruptcy jurisdiction for reasons such as these? Has Congress chosen to exercise such authority? If so, what provisions of the Bankruptcy Act evidence this intent? What is the "factual unity" which justifies such

action by the bankruptcy court? What is a "system" which must be compelled to have "proper economic foundations"? Indeed, what are "economic foundations" and when are they "proper"? These and many other questions are of the greatest importance, not only in the administration of the bankruptcy law, but in the whole field of governmental regulation of corporate activity.

(b) Disregard of Corporate Entities

This case is the first in which any court has ever disregarded corporate entities as between corporations *having no stock relationship whatever.* [1] If, as among such corporations, the corporate entity is to be "a cloak which on some occasions is to be worn and on other occasions is to be stripped off" (R. 949), the effect of such a

---

[1] There is no stock relationship, direct or indirect, between Pittsburgh Railways Company or Philadelphia Company on the one hand, and the following "guaranteed underliers" on the other:

Pittsburgh and Birmingham Traction Company
Brownsville Avenue Street Railway Company
The South Side Passenger Rail Road Company
West Liberty Street Railway Company
The Birmingham, Knoxville and Allentown Traction Company.
Pittsburgh Incline Plane Company.

The same is true of the following "unguaranteed underliers":

Allegheny Traction Company
Millvale, Etna & Sharpesburgh Street Railway Company.

The foregoing examples are entirely aside from the cases of underliers whose intercompany stock control is far less than a majority, and insufficient to exercise any actual control (cf. R. 650, SMR 158).

ruling on corporations throughout the country will be of the utmost concern.

No argument is required to demonstrate the importance of corporations in the business of America, and the extent to which business men rely on their separate existence (especially as to non-affiliates having no stock relationship) as one of the postulates of business life. Consequently it is easy to visualize the dislocations and uncertainties which would ensue from the extension of the doctrine of ignoring corporate entities, to a degree so extreme, and according to principles so tenuous and obscure, as declared by the Circuit Court in this case.

(c) The Validity of Leases in Reorganization Proceedings

The effect of the Circuit Court's decision would be to call into question the validity of leases (even short-term leases which have been renewed over a number of years) everywhere in the United States. Lessors will be placed on notice that leases which have been treated as valid for many years may be stripped of the lessor's power to repossess his property, if the lessee should become bankrupt and the bankruptcy court finds that there exists "factual unity" between its property and that of the lessor.

The importance of long term leases, especially in corporate and railroad transactions, has been acknowledged by this Court. *Palmer v. Connecticut Railway and Lighting Co.*, 311 U.S. 544, 555, 61 S. Ct. 379, 382 (1941). In the field of railroads alone, there are hundreds of leases with literally billions of dollars of securities de-

pendent upon them. *Railroad Leases and Reorganization,* 49 Yale Law Journal 626 (Meck and Masten, 1940).

The status of all of these leases, and of the huge volume of securities behind the lessor companies, (not to mention the companies outside the railroad field) will be unsettled and rendered uncertain by the Circuit Court's decision. The impact of such a decision on practical affairs is too plain for argument.

(d) Disregard of State Law By Bankruptcy Courts

Aside from the disregard by the Circuit Court of the *decisions* of the Pennsylvania Supreme Court (*supra*, p. 19), we have here a disregard of the settled *legislative* policy of the state. The statutes of Pennsylvania expressly permit, even encourage, street railway corporations to do exactly what was done in this case (R. 830, SMR 1075, cf. R. 948, notes 11, 12). These statutes contain not the slightest hint that leases may be converted into conveyances, or that the corporate entities of lessors may be ignored. Yet the bankruptcy court now holds that corporate forms expressly sanctioned by the state, for a wholly intra-state street railway business, may be ignored. If this decision stands, the door will be open to an unseemly conflict between state and federal law, and to untold confusion.

Moreover, this case presents, for the first time, the proposition that a bankruptcy court may ignore state law in determining the *extent* of the property which may be administered as property of the debtor. Although it has been established that federal law governs the *distribution* of a bankrupt's property (*Heiser*

v. Woodruff ... *U.S.* ..., 66 S. Ct. 853), there had never been a case, until the present, in which state law had been ignored in determining whether a given item of property was a proper subject for distribution by the bankruptcy court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that writs of certiorari should issue to the Circuit Court of Appeals for the Third Circuit.

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C. ELMER BOWN
PHILIP A. FLEGER
Attorneys for Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1948.

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY, Debtor

NO. 359.

PHILADELPHIA COMPANY, Petitioner,
v.
JULES GUGGENHEIM ET AL.

NO. 360.

PHILADELPHIA COMPANY, Petitioner,
v.
CITY OF PITTSBURGH

NO. 361.

PHILADELPHIA COMPANY, Petitioner,
v.
HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee for Southern Traction Company 50-Year First Mortgage and Collateral Trust 5% Gold Bonds

REPLY BRIEF OF PHILADELPHIA COMPANY IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF OF PHILADELPHIA COMPANY IN SUPPORT OF PETITION FOR CERTIORARI

In support of Philadelphia Company's petition for writs of certiorari and in reply to respondents' briefs in opposition, we desire to make the following points:

1. The principles involved in this case do not depend on a peculiar or unique fact situation.
2. The Circuit Court's decision is not consistent with prior law.
3. The Circuit Court's decision, cannot be reconciled with this Court's decision in the Dipple case.
4. The public interest will best be served by reviewing the Circuit Court's decision.

1. The Principles Involved in This Case Do Not Depend on a Peculiar or Unique Fact Situation.

The City of Pittsburgh concedes that the present case is important (City's brief, p. 12), but argues that it turns upon the facts rather than the law. We submit, to the contrary, that the principles involved in this case are not limited to any peculiar or unique set of facts, but are applicable to innumerable fact situations. The same reasoning invoked by the Circuit Court of Appeals to ignore the entities of the underlier companies of Pittsburgh Railways Company could be invoked with respect to practically every railroad or street railway in the United States. The Third Circuit itself, only a few weeks after its decision in this case, was constrained to follow it as a precedent in a case involving a lessor company of the Erie Railroad. *New York Trust Co. v. New York and Greenwood Lake Railway Co.*, ...F. 2d .... (3 Cir.; July 17, 1946).

Even outside the railway field, in factual situations wholly unrelated to the present, the Circuit Court's reasoning would supply a technique for invoking bankruptcy jurisdiction which would practically make the Bankruptcy Act a dead letter. The established procedure for voluntary or involuntary petitions for reorganization will be wholly unnecessary if the same result may be achieved by invoking the existence of bankruptcy jurisdiction on the ground of a "public interest" which requires that corporations or "systems" have "proper economic foundations". Substantive rights will be materially affected if corporate entities may be ignored between non-affiliated corporations (as they were by the Circuit Court) and if the effect of their being ignored is

to transform leases into conveyances and to serve as a substitute for corporate mergers and consolidations.

A large part of respondents' briefs is devoted to a discussion of the facts of the case and to the merits of the Circuit Court's decision. We do not undertake to reply to this portion of their briefs because of limitations of time and space and because our argument on the merits would be premature at this time.

Insofar, however, as this Court may give weight to the facts in this case, we ask that it look to the findings of fact in the Special Master's Report. The Circuit Court has characterized this Report as "full and complete and most carefully done" (R. 943), and it provides, we submit, the only reliable guide to the facts.

With respect to the Map submitted with the City's brief, we ask the Court to bear in mind that this map presents only a partial picture in that it fails to give effect to the distinction between the three major systems, Consolidated Traction Company, United Traction Company of Pittsburgh and Pittsburgh Railways Company, a distinction amply demonstrated before the Special Master and observed by him in his Report (See, for example, R. 758, SMR 671). The City's map also fails to furnish any clue as to the contractual or corporate relationship (or lack of relationship) of the companies involved, just as the City's discussion of overlapping routes (City's Brief, p. 5) fails to take into account the Master's analysis of its evidence on this point (R. 770 SMR 711).

Respondents' statements of the facts contain innuendos that Philadelphia Company has been guilty of unfair dealing with the debtor and the underliers. These are unfounded. The Special Master concluded that no mismanagement had been shown (R. 823). The District

Court reached the same conclusion (R. 135 a) and the Circuit Court did not express any disagreement.

2. The Circuit Court's Decision Is Not Consistent With Prior Law.

We cannot agree with the City's assertion that the Circuit Court's decision is consistent with prior law. The Circuit Court frankly acknowledged as to the cases on which it relied (R. 950, n. 15) that:

> "Language broad enough to act as a foundation for the present decision is not lacking in these cases, *but in each instance the decision itself did not require such breadth.*" (Italics supplied).

None of these cases is a corporate reorganization case under Chapter X or 77B.[1] None of them involved leases or operating agreements comparable to those in the present case, and none of them involved the disregard of corporate entities between *non-affiliated* corporations.

Respondents do not comment on the practice of the Interstate Commerce Commission, nor do they deny our assertion (Phila. Co. petition for certiorari, p. 21) that the Circuit Court's decision is contrary to the Commission's practice in railroad reorganizations.

Insofar as the City relies on Finletter on Bankruptcy Reorganization (City's Brief, p. 20) to support the Circuit Court, it fails to call attention to the same author's statement (at page 140) that:

---

[1] The City cites (Brief, p. 22) *re Hotel Gibson Co.*, 11 F. Supp. 30 (D. C. Ohio, 1935), a 77B case which dealt with a real estate device peculiar to the State of Ohio. The Gibson case was not cited by the Circuit Court in the instant case.

> *"Since the debts of the subsidiary cannot be reorganized in the proceeding of the parent, the court has no general dominion over its property* and interference with the enforcement by third persons of their claims against that property will therefore not be allowed." (Italics supplied).

The City's reference (Brief, p. 23) to *Price v. Gurney,* 324 U.S. 100, 65 S. Ct. 513 (1945) does not take into account the following statement in that case which is clearly contrary to the decision of the Circuit Court in the present case (324 U.S. at 106; 65 S. Ct. at 516):

> "But under the Bankruptcy Act the power of the court to shift the management of a corporation from one group to another, to settle intracorporate disputes, and to adjust intracorporate claims *is strictly limited to those situations where a petition has been approved."* (Italics supplied).

Furthermore, the City treats the instant case as though it involved nothing more than long term leases. The fact is, to the contrary, that more than 75% of the property in question was operated by the debtor pursuant to operating agreements (R. 846, 654) which have been held to pass no title to the debtor. This was the decision of the Supreme Court of Pennsylvania in *Second Avenue Traction Company v. United Traction Company of Pittsburgh,* 328 Pa. 257, 195 A. 25 (1937), a case which the City, like the Circuit Court of Appeals, fails to take into consideration. The Second Avenue case, moreover, is consistent with the recent decision in *Thompson v. Texas Mexican Ry. Co.,* 324 U.S. 838, 66 S. Ct. 937, 942 (1946), where this court said:

"If we were dealing here with a lease, a suit to effect its forfeiture could not be maintained in another court without consent of the reorganization court. *But the trackage agreement created only a personal obligation and did not purport to grant Brownsville any estate in the property of Tex-Mex.*" (Italics supplied).

3. The Circuit Court's Decision Cannot Be Reconciled With This Court's Decision in the Dipple Case.

We submit that the City's attempt (City's brief, p. 31) to distinguish the Dipple case (*Philadelphia Co. v. Dipple,* 312 U.S. 168, 61 S. Ct. 538; 1941) is unsuccessful. The City refers to the Dipple case as one in which Philadelphia Company was "seeking special treatment for the underliers and for itself". The fact is, to the contrary, that the case was initiated by the Trustees of the Debtor, who sought instructions as to whether the taxes in question should be paid.

Neither can the Dipple case be explained as having been based solely upon a desire to avoid preferences among creditors. If this were true, it would have been necessary to refuse the payment of taxes on *all* of the property operated by the debtor, including the property of the debtor itself as well as the property of the underliers. Indeed, this would be especially true of the property of the debtor since it, of all property in the system, was least likely to earn a sufficient sum to pay its taxes (R. 774, SMR 732). Yet the Dipple case *permitted* the payment of taxes on the debtor's own property (312 U.S. at 175) while refusing to permit the payment of taxes of the underliers. Neither did the case make any provision for the payment by the debtor of taxes of underliers to the extent that the

assets or earnings of any given underlier were sufficient to permit taxes to be paid, a procedure which should have been followed if the avoidance of preferences had been the rationale of the case.

We submit that the Dipple case can only be explained as having been based on a clear distinction between the property of the debtor on one hand and the property of the underliers on the other, a distinction which the City now seeks to obliterate.

4. The Public Interest Will Best Be Served by a Review of the Circuit Court's Decision.

The City, like the other respondents, argues that the Circuit Court's decision is in the public interest and should not, therefore, be reviewed. We submit, on the other hand, that the Circuit Court's decision is itself contrary to the public interest by reason of the confusion which it will introduce into this case and into the law in general.

If this Court refuses certiorari, and if plan hearings are undertaken (on a plan as to which the City among others has already expressed its dissatisfaction) the hearings will be tormented with constant doubts and problems as to the effect of the Circuit Court's ruling on the jurisdiction of the Court, and on the relative rights of the parties. The Trustee's petition for clarification is typical of the problems which will be faced. These doubts and uncertainties will add unnecessary time and expense to the hearings and will, in all probability lead to further litigation. Even if a plan of reorganization be confirmed, the confusion inherent in this process will probably make necessary a further appeal to this court

which would call into question the very same problems now before this Court.

We suggest that the public interest requires, in a proceeding of this size and importance, that the parties be not cut loose to flounder in a sea of uncertainty, but that this Court should answer authoritatively the many problems which will vex this proceeding and numerous other proceedings as long as the Circuit Court's decision stands as a question mark before the legal profession.

Respondents' conception of the public interest requires, we believe, that violence be done to the Bankruptcy Law. They ignore the fact that the highest public interest is that which requires that legal proceedings be conducted according to orderly processes and according to the law of the land. That "public interest" is illusory which requires that the Bankruptcy Law be given a tortured construction or totally ignored. The confusion, and the ultimate disrespect for law, inherent in any such process would completely vitiate any short-sighted benefits which might be invoked in its support, even if such benefits existed.

Because of their impact on future litigation, the principles of the instant case must inevitably be reviewed by this Court at some time, either in this case or in some other case. We submit that the public interest will be best served, and the law rendered more stable and certain, by an immediate review.

Respectfully submitted,

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PHILIP A. FLEGER,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY, Debtor

NO. 359.

PHILADELPHIA COMPANY, Petitioner,
v.
JULES GUGGENHEIM ET AL.

NO. 360.

PHILADELPHIA COMPANY, Petitioner,
v.
CITY OF PITTSBURGH

NO. 361.

PHILADELPHIA COMPANY, Petitioner,
v.
HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee for Southern Traction Company 50-Year First Mortgage and Collateral Trust 5% Gold Bonds

SUPPLEMENTAL REPLY BRIEF OF PHILADELPHIA COMPANY IN SUPPORT OF PETITION FOR CERTIORARI.

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SUPPLEMENTAL REPLY BRIEF OF PHILADELPHIA COMPANY IN SUPPORT OF PETITION FOR CERTIORARI.

The purpose of this supplemental reply brief is to advise the Court that the statements made in Philadelphia Company's reply brief (filed September 16) apply with equal force to the brief of the Securities and Exchange Commission (received by Philadelphia Company on September 20.) [1]

[1] Respondents' briefs were due on September 10, 1946 and were received by Philadelphia Company on or before that date. Philadelphia Company filed a reply brief on September 16. The brief of the Securities and Exchange Commission, supporting respondents' position,

We again ask the Court to look to the Special Master's report (R. 604 et seq.) for the facts in the case. We submit that this report establishes that:

1. "There appears to be no serious difficulty in distinguishing the debtor's property from the properties of the underliers." (R. 825, SMR 1069).

2. The properties of the major underliers can be separately operated, not merely in the narrow sense of running a car along a few blocks, but in the broad sense of a "practicable" operation as defined by the Special Master (R. 777 et seq.).

In conclusion, we wish to emphasize that the respondents and SEC use the word "jurisdiction" in an ambiguous fashion. We are not concerned with the jurisdiction of the Bankruptcy Court merely to *entertain* the City's petition. Jurisdiction in this sense was not in issue in the Court below and is not in issue here. We are concerned, rather, with the correctness of the Circuit Court's conclusion that the Bankruptcy Court has jurisdiction actually to "grant the City's petition by pulling into the organization willy-nilly the underliers" (R. 943).

Respectfully submitted,

THOMAS J. MUNSCH, JR.
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was not received by Philadelphia Company until September 20, and consequently, was not dealt with in Philadelphia Company's reply brief.

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In The

Supreme Court of the United States

OCTOBER TERM, 1940

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY, Debtor.

NO. 362

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

v.

JULES GUGGENHEIM ET AL.

NO. 363

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

v.

CITY OF PITTSBURGH

NO. 364

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

v.

HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee, etc.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, BRIEF, AND JOINDERS.

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HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee, etc.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of MONONGAHELA STREET RAILWAY COMPANY, a Corporation, and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, a Corporation, respectfully shows:

Matter Involved.

The Matter Involved arises out of proceedings for the reorganization of a debtor under Section 77B of the Bankruptcy Act and the Chandler Act.

The Debtor, Pittsburgh Railways Company, for many years has operated street railways wholly intrastate in Pittsburgh and environs. The operated lines are of three categories: (1) lines owned by Debtor; (2) lines leased to Debtor; (3) lines leased to other corporations and operated by Debtor under short-term operating agreements with the lessees.

This Petition involves the status, with respect to the reorganization proceedings, of two lessor corporations* whose lines are within the third category.

The Petitioners, respectively, own, and formerly operated, completely integrated and fully equipped street railway systems extending in and from Pittsburgh into suburban territory, boroughs, and other cities (SMR** pars. 62, 71, 80, R.*** 632, 636, 638).

In 1902, Petitioners leased their respective systems for 900 years to two different corporations, both controlled by Philadelphia Company. The respective lessees covenanted to pay rentals, taxes, and bond interest, to operate the lines, and to keep them fully equipped with modern facilities. The leases were duly recorded in the office for recording deeds, leases, etc. They contain defeasance clauses, providing for their termination in case

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*Hereinafter referred to, separately, as Monongahela and Birmingham, and, together, as Petitioners.

** SMR refers to Special Master's Report.

*** R. refers to the Record as printed in the court below, together with the proceedings and opinion of that court, heretofore furnished to the Clerk of this Court.

of default in the lessee's covenants and the surrender of the demised property, together with all additions, improvements, and substitutions.

Petitioners have caused their properties to be continuously maintained and operated for public use, under their respective leases from the times they were made to the present.

Philadelphia guaranteed the covenants of the lessees.

The material parts of the two leases and the guaranties appear in R. 885-909.

The two lessee corporations made operating agreements with Pittsburgh Railways, each for the term of five years and, thereafter, terminable on three months' notice (SMR pars. 164, 166, R. 654, 655).

All the shares of stock of Pittsburgh Railways, Debtor, was, and now is, owned by Philadelphia Company (SMR par. 18, R. 615).

Petitioners are not now, and never have been, owned or controlled by Philadelphia Company, by Debtor, or by any of their subsidiaries. The stock of Petitioners is entirely owned by the public, with the exception of a 24.7% stock interest in Monongahela, acquired by Philadelphia Company and its non-railway subsidiaries after the institution of the present bankruptcy proceedings. (SMR par. 26, R. 618). Both Petitioners are solvent and able to meet their debts as they mature (SMR par. 57, R. 631; Opinion,* R. 944).

On May 10, 1938, Debtor filed a petition for reorganization under Sec. 77B of the Bankruptcy Act [11

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* Opinion refers to the opinion of the Circuit Court of Appeals below.

U.S.C.A. § 207], in the District Court of the United States for the Western District of Pennsylvania (SMR par. 1, R. 613).

Neither the leases made by Petitioners nor the operating agreements made by their respective lessees with Pittsburgh Railways have been affirmed or rejected by the Trustees under Section 116 (1) of the Bankruptcy Act [11 U.S.C.A. § 516 (1)].

On October 23, 1942, the City of Pittsburgh filed the petition with which we are here concerned (R. 40 a).

On November 27, 1942, the present Petitioners filed Motions to Dismiss the City's petition as to them (R. 17 a, R. 872-884). Decision on these motions was deferred by the Special Master until after hearings on the City's Petition (SMR par. IV, R. 611). Petitioners have never filed any claims in these bankruptcy proceedings and have taken no part therein, except in support of their respective Motions to Dismiss.

The City's petition asked the District Court to exercise jurisdiction over the properties of all so-called underlier companies, determine the rights, claims, and interests of all creditors and stockholders of said Underliers,* as persons having claims against or interests in the Debtor or its properties (R. 75 a).

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*As used herein and in the Special Master's Report, the following terms are thus defined:

"Underliers", generally, are corporations owning properties in Debtor's possession through leases or operating agreements;

"Philadelphia Underliers" are subsidiaries of Philadelphia Company;

"Guaranteed Underliers" are lessor corporations whose leases are guaranteed by Philadelphia Company and include Monongahela and Birmingham.

The City's petition contained alternative prayers, including one to direct Petitioners to file voluntary petitions for reorganization in bankruptcy; but these prayers were not pressed or considered by the District Court (R. 76 a, Note; 133 a; and SMR par. 12, R. 614).

The District Court referred the petition to a Special Master who held hearings over a period of more than two years, and, on January 29, 1945, filed an exhaustive report containing Findings of Fact, Conclusions of Law, and a Recommendation that the petition of the City be dismissed.

The District Court adopted the Conclusions of Law of the Special Master, accepted his Findings of Fact, subject to a few unimportant modifications, and dismissed the City's petition (R. 148 a, 149 a).

Appeals to the Circuit Court of Appeals for the Third Circuit from the Decree of the District Court were taken by the City of Pittsburgh, Jules Guggenheim et al., and Horace F. Baker and John A. Beattie, Protective Committee etc. (R. 25 a).

In finding that the Master's report was full, complete, and most carefully done and that all parties had taken the facts as found by the Master, the Circuit Court of Appeals said:

> "The controversy before us relates only to the legal conclusions to be drawn from the facts found." (Opinion, R. 943).

The Conclusions of Law of the Special Master, adopted by the District Court (R. 148 a) appear in SMR, R. 836, 837. The Conclusions of the Special Master may be epitomized, as follows:

(1) The Court has jurisdiction to determine the rights, titles, and interests of the Debtor in the properties in the custody of the Court and to determine, to the extent necessary for the purposes of this reorganization proceeding, what are the rights, titles, and interests of the Underliers and their stockholders and creditors with respect to those properties;

(2) The facts do not justify the disregarding of the corporate entities of any of the Underliers;

(3) The leases made for terms of years, as between the parties or their creditors or for the purpose of reorganization of the leaseholder, under the Bankruptcy Laws, are not equivalent to conveyances in fee with reservations of liens or qualified titles as mere security for the payment of moneys;

(4) The properties which, in respect of legal titles, are owned by the Underliers are not the property of the Debtor within the meaning of the Bankruptcy Law;

(5) Without the filing and approval of petitions by or against the Underliers, as prescribed by Bankruptcy Laws, the District Court does not have jurisdiction to reorganize such Underliers or to deal with their properties as though they were the properties of a debtor, as that term is defined in the Bankruptcy Act;

(6) The petition of the City of Pittsburgh should be dismissed.

The Circuit Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings not inconsistent with the opinion of the Circuit Court of Appeals (Opinion, R. 952).

The Opinion of the Circuit Court states (R. 943):

> "Our problem at the present time is confined to a single but very important legal question. That question relates to the power of the court to grant the city's petition by pulling into the [re]organization, willy nilly, the underliers. * * *."

The Circuit Court does not state, however, how this is to be done.

The Trustee of Debtor petitioned the Circuit Court "to clarify and amplify its opinion and order" (R. 955, 964); but the petition was denied (R. 970).

In view of the statement made by the Circuit Court (Opinion, R. 943) that the controversy related solely to the legal conclusions of the District Court, the soundness of those conclusions is the question here involved.

Jurisdiction.

The Circuit Court of Appeals, on May 7, 1946, reversed the judgment of the District Court and remanded the case for further proceedings not inconsistent with its Opinion.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938; U.S.C.A., Title 28, Section 347.

Questions Presented.

Where a Pennsylvania corporation lawfully owning and operating a completely equipped street railway system, wholly intrastate, leases such properties for 900 years to a Pennsylvania traction company which oper-

ates, or causes to be operated, such properties as part of a general system of railways, all as authorized by Pennsylvania statutes, the lessee agreeing to operate, maintain, and keep in good repair the leased properties, fully equipped with the best and most improved equipment, and, upon termination of the lease, by time or default, to deliver to the lessor all of the demised properties, together with any substitutions, additions, and improvements thereto or thereon; and, thereafter, the lessee turns over possession of the leased properties to a street railway company for operation and maintenance as required by the lease, there being no control by the lessor of the lessee or operating company or by either of the latter of the lessor, directly or indirectly, by stock ownership or otherwise; can a court, in bankruptcy reorganization of the debtor operating company,—

(1) Disregard the corporate entity of lessor, for the purpose of reorganizing it with a debtor in bankruptcy proceedings, when the lessor is not owned or controlled by stock ownership or otherwise by debtor or any other corporation and when, to do so, would carry lessor's properties to public investors in its stock, and not to the debtor in the reorganization?

(2) Treat the properties of the lessor as the property of the debtor, contrary to the statutes and decisions of the court of last resort of Pennsylvania and in conflict with decisions of this Court, as to the binding effect of local law in bankruptcy proceedings?

(3) Treat the leases in a manner contrary to the provisions of the Bankruptcy Law, dealing with the treatment of leases?

(4) Reorganize the lessor in bankruptcy proceedings, without the filing of a petition for reorganization by or against it and in spite of the fact that the lessor is solvent and able to meet its debts as they mature, contrary to the express provisions of the Bankruptcy Laws?

Reasons Relied on for Allowance of Writs.

I.

The Circuit Court appears to express the opinion that the corporate entities of all the Underliers should be disregarded (Opinion, R. 951). The purpose seems to be to reorganize all the corporate Underliers in reorganization proceedings of the Debtor.

The Circuit Court does not claim that there is any judicial precedent for such a proceeding, in so far as Petitioners are concerned (Opinion, R. 950). It has, therefore, decided an important question of Federal Bankruptcy law which has not been, but should be, settled by this Court.

Furthermore, such a proceeding, in so far as Petitioners are concerned, would so far depart from the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

If the entity of a corporation is disregarded, its stockholders are treated as an association of persons who own its properties (*U. S. v. Milwaukee R. T. Co.*, (1905), 142 Fed. 247, per Sanborn, J.).

But the shares of stock of Petitioners are owned by the public—not by Debtor or its subsidiaries.

The disregard of the corporate entities of Petitioners, therefore, would not bring them or their properties into the reorganization proceedings of the Debtor.

Petitioners are not controlled in any way by the Debtor or Philadelphia Company.

See further, Argument, page 18, *infra.*

II.

The Opinion of the Circuit Court appears to decide that property laws of the state where the property is situated are not controlling in bankruptcy proceedings (Opinion, R. 948).

In so far as the Opinion so holds, it decides an important question of local law, in conflict with applicable local decisions and in conflict with the decisions of other circuit courts of appeals, and of this Court, as to the binding effect of local law in determining property rights.

The leases made by Petitioners and the operation of the demised street railway lines, as parts of a general system, were authorized by Pennsylvania statutes. The leased properties are entirely within that State (See p. 21, *infra*).

The Supreme Court of Pennsylvania has held that such leases are valid demises of possessory rights and not conveyances of title (See pp. 21, 22, *infra*).

The Bankruptcy Acts provide that a plan of reorganization may deal with the property of the Debtor.

Circuit Courts of Appeals of the Second, Fourth, Eighth, and Tenth Circuits have held that, what the property of a debtor in bankruptcy consists of is to be

determined by the application of local law (See pp. 24-25, *infra*).

This Court has applied the same rule, not only to intercorporate relations, but also to the rights of creditors (See p. 23, *infra*).

To treat the properties of these Petitioners as the property of the Debtor, for the purpose of its reorganization in Bankruptcy, would be a taking of Petitioners' properties without due process of law in violation of the Fifth Amendment to the Constitution.

To upset the validity of long-term railroad and railway leases, guaranteed by other corporations, would be disastrous to the stockholders of the lessor corporations. Such stocks are widely held and are authorized investments for life insurance companies under the laws of New York (See p. 29, *infra*).

III.

In so far as the Opinion of the Circuit Court authorizes the treatment of the leases made by Petitioners as conveyances, or as something other than leases, it conflicts with the provisions of the Bankruptcy Laws and the application thereof by this Court and by Circuit Courts of Appeals of other Circuits.

For this reason, this Court's power of supervision is called for.

The Bankruptcy Laws provide how leases shall be treated in bankruptcy reorganization proceedings. They are not treated as conveyances; but as executory contracts which can be rejected and the demised properties returned to the lessors or affirmed (See pp. 27, 28, *infra*).

This Court and Circuit Courts of Appeals of other Circuits have applied this treatment of leases in railroad reorganizations in bankruptcy (See pp. 29, 30, *infra*).

The bankruptcy court can not make a new and different contract with a lessor without its consent (See p. 31, *infra*).

This Court has already indicated that the leases involved in this proceeding should be dealt with either by affirmance or disaffirmance: *Philadelphia Company v. Dipple* (1941), 312 U.S. 168, 174 (See p. 31, *infra*).

IV.

The Opinion of the Circuit Court states in effect (Opinion, R. 943) that the facts found by the Special Master are not disputed; but that the controversy relates only to the legal conclusions.

The fifth conclusion of law of the Special Master adopted by the District Court (R. 148 a) is, in effect, that, without the filing and approval of petitions by or against the several Underliers as prescribed by Bankruptcy Laws, the District Court does not have jurisdiction to reorganize such Underliers or to deal with their properties as though they were the properties of a debtor (SMR, R. 837).

In so far as the Circuit Court's Opinion holds to the contrary, it violates the requirements of the Bankruptcy Laws and so far departs from the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The Opinion of the Circuit Court proceeds on the theory that all the Underliers, including these Petitioners, can be reorganized in the present bankruptcy

proceedings or their properties dealt with, as if they were the properties of the Debtor, without compliance with the requirements of the Bankruptcy Laws (See p. 33, *infra*).

It is only by the filing of a petition for reorganization by a corporation, or by three or more of its creditors, that the court acquires jurisdiction—and then only over the debtor and its property [11 U.S.C.A. § 511]. (See p. 33, *infra*).

No such petition has been filed by or against Petitioners (See p. 33, *infra*).

The petition must state that the corporation is insolvent or unable to pay its debts as they mature [11 U.S.C.A. § 530] and, in the case of a creditor's petition, that the corporation has committed an act of bankruptcy [11 U.S.C.A. § 531].

It is not averred or pretended that such is the case with respect to either Petitioner. The contrary is indicated in the Opinion of the Circuit Court (R. 944) and in SMR par. 57, R. 631.

WHEREFORE, your Petitioners respectfully pray that writs of certiorari may issue out of and under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the Record of all proceedings in said Circuit Court of Appeals, in the cases entitled, "In the Matter of Pittsburgh Railways Company, Debtor", Appeals from Orders of the District Court of the United States for the Western District of Pennsylvania Dismissing Petition of City of Pittsburgh Relative to Underlier Companies, by City of Pittsburgh;

Jules Guggenheim et al.; Horace F. Baker et al., etc., Appellants, Nos. 8967, 8964, and 8996 October Term, 1945, to the end that said cases may be reviewed and determined by this Court, that the judgments and orders of the Circuit Court of Appeals for the Third Circuit may be reversed by this Court, and that your Petitioners may have such other and further relief as to this Court may seem proper.

MONONGAHELA STREET RAILWAY COMPANY, PITTSBURGH AND BIRMINGHAM TRACTION COMPANY.

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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The Opinion of the District Court (McVicar, J.) is reported in 60 F. Supp. 600. It appears in the Record, at page 133 a.

The Opinion of the Circuit Court of Appeals for the Third Circuit (Goodrich, Circuit Judge) is reported in 155 F. (2d) 477. It appears in the Record, at page 939.

Jurisdiction.

See Petition for Writs of Certiorari, page 7, *supra*.

Statement of the Case.

See Petition for Writs of Certiorari (Matter Involved), pages 2 to 7, *supra*.

Specifications of Error To Be Urged.

I.

The Circuit Court of Appeals erred in so far as its Opinion purports to hold that the corporate entities of these Petitioners, Monongahela and Birmingham, should be disregarded and their properties brought into the reorganization proceedings of Pittsburgh Railways, Debtor, particularly in view of the fact that the shares of stock of Petitioners are not owned by Debtor, but by the public, and that the effect of the disregard of the corporate entities of Petitioners would be to treat their properties as the properties of their public stockholders —not of Debtor.

II.

The Circuit Court of Appeals erred in so far as its Opinion purports to treat the wholly intrastate street railway properties owned by Petitioners, and by them, respectively, leased for long terms to two traction companies, and operated by Debtor under short-term operating agreements, as the properties of the Debtor, contrary to property laws of Pennsylvania as established by decisions of its highest court, whereby lessors are held to own such property, subject only to demises of possessory rights, and as established by Pennsylvania statutes, authorizing the leases made by Petitioners and the operation of the demised railways as parts of a general system.

III.

The Circuit Court of Appeals erred in so far as it holds that what constitutes property of a debtor in bankruptcy reorganization proceedings is not to be determined by the applicable law of the State in which the property is situated, in conflict with decisions of this Court in bankruptcy proceedings.

IV.

The Circuit Court of Appeals erred in so far as its Opinion purports to authorize the treatment of the leases made by Petitioners in a manner contrary to the specific provisions of the Bankruptcy Reorganization Laws with respect to the treatment of leases.

V.

The Circuit Court of Appeals erred in so far as its Opinion purports to hold that Petitioners can be reorganized in bankruptcy proceedings, without the filing

and approval of petitions by or against them and where Petitioners are solvent corporations, able to pay their debts as they mature.

VI.

The Circuit Court of Appeals erred in so far as its Opinion decides that a plan of reorganization of the Debtor may deal with the properties of Petitioners, as if they were the properties of the Debtor, in violation of the Fifth Amendment to the Constitution of the United States, wherein it is provided:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

VII.

The Circuit Court of Appeals erred in so far as its Opinion overrules the Conclusions of Law made by the Special Master and adopted by the District Court, in so far as these Petitioners are concerned.

VIII.

The Circuit Court of Appeals erred, in so far as these Petitioners are concerned, in reversing the judgment of the District Court and remanding the case for further proceedings not inconsistent with the Opinion of the Circuit Court of Appeals.

Summary of Argument.

Under "Reasons Relied on for Allowance of Writs" (p. 9, *supra*), our Argument is epitomized with references thereto, rendering, we believe, a Summary thereof superfluous.

ARGUMENT.

I.

In So Far as the Decision Purports to Disregard the Corporate Entities of Petitioners and Reorganize Their Properties as Those of Debtor, It Departs from the Usual Course of Judicial Proceedings and Decides an Important Question of Federal Law, Without Judicial Precedent, Which Should Be Settled by This Court.

The Circuit Court appears to express the opinion that the corporate entities of the Underliers should be disregarded (Opinion, R. 951, 952). The apparent objective of such a course would be to bring the properties of the Underliers into the present reorganization proceedings, as the properties of the Debtor.

If the entity of a corporation is disregarded, it is treated as an association of persons, who are regarded as the owners of the property of the corporation (*U.S. v. Milwaukee R. T. Co.*, (1905), 142 Fed. 247, per Sanborn, J.).

In cases where the Pittsburgh Railways, Debtor, owns all or substantially all of the stock of an underlying corporation, the disregard of the corporate entity of the latter would carry its properties to the Debtor. There is, therefore, an objective to be attained by disregarding the corporate entities of any wholly-owned subsidiary of Pittsburgh Railways.

When we come to the Petitioners, however, the disregard of their corporate entities would carry their properties to their stockholders, who are public investors. The disregard of the corporate entities of Petitioners

would not result in their properties being vested in the Debtor; and the objective aimed at by the City, and, apparently, by the Circuit Court, would not be attained.

The second Conclusion of Law of the Special Master, adopted by the District Court, is as follows:

> "2. The facts do not justify the disregarding of the corporate entities of any of the underliers" (R. 836).

This conclusion is particularly applicable to Petitioners, Monongahela and Birmingham. They were in existence, as operating street railway or traction companies (SMR pars. 62, 71-73, 80, R. 632, 636, 637, 638), many years before their properties were leased to subsidiaries of Philadelphia Company (SMR par. 110, R. 641) and came into the possession of Debtor under short-term operating agreements between it and the lessee companies, Consolidated and United (SMR pars. 112-117, R. 642). Neither Monongahela nor Birmingham was organized by the Debtor, by Philadelphia Company, or by the subsidiaries of either. Petitioners have, respectively, maintained their corporate existence ever since the leases were made in 1902 (SMR pars. 799, 846, 847, R. 789, 798). None of the stock in either of the Petitioners is owned by Debtor, or its subsidiaries, or by Philadelphia Company or its subsidiaries, except a 24.7% interest in the stock of Monongahela acquired by Philadelphia Company and some of its non-railway subsidiaries after the institution of these bankruptcy proceedings (SMR par. 26, R. 618). Petitioners were not and are not controlled by Philadelphia Company or by the Debtor (SMR par. 1086, R. 834).

Monongahela and Birmingham have not merely maintained a formal corporate existence. Their officers and directors are not interlocked with those of Debtor, Philadelphia Company, or their subsidiaries or affiliates. The offices of the latter are in a different building from those of Petitioners (SMR, Pars. 846, 847, R. 798). Petitioners have handled their financial affairs, filed tax returns reporting their rentals as income, and distributed their net income as dividends. They have actively protected their interests by successfully carrying on actions against their lessees and Philadelphia Company, their guarantor, to require performance of the covenants of the leases and guaranties (SMR pars. 861, 862, R. 800, 801).

Under the facts found by the Special Master and the District Court, disregard of the corporate entities of Monongahela and of Birmingham is without basis, does not bring Petitioners or their properties into these reorganization proceedings, and is a departure from the accepted and usual course of judicial proceedings.

The Circuit Court does not claim that there is any judicial precedent for the disregard of the corporate entities of Petitioners (Opinion, R. 950).

Where the stock of a corporation is owned by the public and the corporation is not controlled by a debtor in bankruptcy reorganization, through stock ownership or otherwise, a decision that the separate entity of the corporation should be disregarded and that its properties should be treated as the properties of the debtor is a decision of an important question of Federal law which has not been, but should be, settled by this Court.

II.

In So Far as the Decision Treats the Properties of Petitioners as the Properties of Debtor, the Circuit Court Has Decided an Important Question of Local Law in a Way in Conflict With Applicable Local Decisions, and in Conflict With Decisions of Other Circuit Courts of Appeals and of This Court, as to the Binding Effect of Local Law, in Determining Property Rights.

The leases made by Petitioners and the operation of their properties, as parts of a general system of street railways, were authorized by Pennsylvania Statutes, including the Act of May 15, 1895, P. L. 63, 67 P.S. 1279, authorizing street railway companies to lease their properties and franchises to traction companies, the Act of May 15, 1895, P. L. 64, 15 P.S. 1894, authorizing such leases by one traction company to another, and the Act of May 15, 1895, P. L. 65, 15 P.S. 1897, authorizing the operation of such leased lines as a general system of different lines owned, leased, controlled, or operated by a traction company or a street railway company (SMR par. 1072, R. 827; Opinion R. 948, notes 11, 12).

That long-term leases made under these statutes are valid demises of possessory rights and that the lessors retain the ownership of the properties leased has been held by Pennsylvania courts in many decisions, including *Reeves, et al., v. Philadelphia Traction Co., et al.*, (1893), 152 Pa. 153, 165; 25 A. 516, 518; *Citizens Passenger Railway Co. v. Public Service Commission* (1921), 271 Pa. 39, 44; 114 A. 642, 644; and *Commonwealth ex rel. v. Union Traction Company of Philadelphia, et al.*, (1937), 327 Pa. 497, 516, 518; 194 A. 661, 670, 671.

That the leases of Monongahela and of Birmingham are valid leases in full force and effect has been held by the Supreme Court of Pennsylvania in *Monongahela Street Railway Co. v. Philadelphia Co. and Consolidated Traction Co.* (1944), 350 Pa. 603, 606; 39 A. (2d) 909, 911, and by the Common Pleas Court of Allegheny County, Pa., in *Pittsburgh & Birmingham Traction Co. v. Philadelphia Co. and United Traction Co.* (R. 912).

As previously pointed out, the possession of Petitioners' street railway lines by Debtor is under short-term operating agreements with Petitioners' respective lessees, Consolidated Traction Company and United Traction Company.

That these operating agreements did not convey title, but merely turned over possessory rights to Debtor, is specifically held in the case of *Second Ave. Traction Co. for use v. United Traction Co. of Pgh.* (1937), 328 Pa. 257, 259; 195 A. 25, 26, as follows:

> "The agreement of December 30, 1901, was not a conveyance to Pittsburgh [Railways] Company of any title of United [Traction] Company in the railway lines. It was merely an agreement by which United Company turned over *possession* of the lines to Pittsburgh Company for the purpose of operation. * * *" [Italics supplied by the Court]

It is submitted that, under Pennsylvania decisions and statutes, the leases made by Petitioners are valid demises of possessory rights only, and that the ownership of the demised property remains in the lessors and is not the property of the lessees or of the Debtor under its short-term operating agreements.

The Circuit Court recognized the validity of the leases under Pennsylvania law (Opinion, R. 947), but said,

> "The Pennsylvania statutes do not, nor could they, forbid or delimit the jurisdiction of a federal bankruptcy court. * * *." (Opinion, R. 948).

The answer to this proposition is two-fold: (1) Property rights in bankruptcy proceedings are determined by application of the local law of the state where the property is situated; (2) The treatment of leases, as such and not as conveyances, is provided for in federal statutes dealing with reorganization proceedings in bankruptcy.

We shall now discuss point (1) and, at page 27, *infra,* discuss point (2).

Chapter X, Section 216 (2) of the Bankruptcy Act [11 U.S.C.A. § 616] provides,—

> "A plan of reorganization under this chapter—
> "* * *
> "(2) may deal with all or any part of the property of the debtor;"

What is the property of a debtor in bankruptcy is to be determined by the application of the local state law: *Mangus v. Miller* (1942), 317 U.S. 178. This is so, not only with respect to the rights of parties to intercorporate relations, but also with respect to the rights of creditors: *Holt v. Crucible Steel Company of America* (1912), 224 U.S. 262; *Benedict v. Ratner* (1925), 268 U.S. 353; *Corn Exchange National Bank & Trust Co. v. Klauder* (1943), 318 U.S. 434.

The most recent decision of this Court on this point is *Corn Exchange Nat. Bank & T. Co. v. Klauder* (1943),

318 U.S. 434. This case involved the question of whether an assignment of accounts receivable by a creditor, prior to its bankruptcy, without notice to the debtors on the accounts, was effective as against the trustee. Sec. 60 (a) of the Bankruptcy Act [11 U.S.C.A. 96 (a)] provides that the time of transfer, for the purpose of deciding whether it was within four months of bankruptcy, shall be deemed to be the time when the transfer is so far perfected that no bona fide purchaser from the assignor and no creditor could acquire rights superior to the transferee. This Court upheld the decision of the court below, applying Pennsylvania law to the question as to whether or not a bona fide purchaser could have acquired superior rights. This Court said, referring to the Bankruptcy Act (p. 436):

> "* * * Its apparent command is to test the effectiveness of a transfer, as against the trustee, by the standards which applicable state law[8] would enforce against a good-faith purchaser. * * *"

In note 8, referred to, it is said:

> "Questions of this sort arising in bankruptcy cases were solved by reference to state law even before the decision of Erie R. Co. v. Tompkins, 304 U.S. 64 * * *."

The rule, as to the binding effect of state law, has been applied in bankruptcy cases by various Circuit Courts of Appeals, including *Sweeney v. Medler*, 78 F. (2d) 148, (C.C.A. 10, 1935); *McCance, et al., v. D. A. Schulte, Inc., of New York*, 91 F. (2d) 733, (C.C.A. 2, 1937); *Miller v. McCray Refrigerator Co.*, 130 F. (2d) 873, (C.C.A. 8, 1942).

In *In re Kearns et al.*, 8 F. (2d) 437, (C.C.A. 4, 1925) [certiorari denied 269 U.S. 587], the question

was whether or not an estate by the entireties, of which a bankrupt was one of the tenants, could be subjected to payment of his debts.

The Circuit Court of Appeals (4th) said in its opinion (p. 437)—

> "* * * Hence, if an estate by entireties under North Carolina law cannot be subjected to the payment of debts of either tenant during the period of their joint lives, this court would, in administering the bankruptcy law, follow and adopt the construction and interpretation placed by the state upon its own Constitution and laws, as the rule of property within the state."

The *Kearns* case was followed in *Dioguardi v. Curran,* 35 F. (2d) 431, (C.C.A. 4, 1929).

It was held in *Finn v. 415 Fifth Ave.,* 153 F. (2d) 501, (C.C.A. 2, 1946) [certiorari denied May 6, 1946, 66 S. Ct. 1014], that the New York Rent Control Law applies to the tenancy of a trustee in bankruptcy reorganization of a lessee company.

In so far as the public interest is concerned, the validity of leases of street railway properties and operating agreements thereunder in intrastate transportation, is to be determined by state law. Pennsylvania has expressly authorized such leases and operating agreements by the statutes referred to at page 21 above. There is no federal statute containing any provisions to the contrary. Jurisdiction of a Bankruptcy Court to interfere with the exercise of the powers of a State to regulate local transportation and intercorporate relations, between companies engaged therein, can not be assumed without clear authorization by Act of Con-

gress: *Palmer v. Commonwealth of Massachusetts* (1939), 308 U.S. 79, 84.

It is submitted that the decision of the Circuit Court, in so far as it purports to hold that the leases made by Petitioners are conveyances or that the properties leased are to be treated as properties owned by the Debtor for the purpose of reorganization, is contrary to the applicable law of Pennsylvania and conflicts with decisions of this Court and of Circuit Courts of Appeals of other Circuits, as to the law applicable in the determining of property rights in bankruptcy proceedings.

It is further submitted that the Circuit Court erred in so far as its decision purports to set aside the third Conclusion of the Special Master, adopted by the District Court, to the effect that leases for terms of years, whether long or short, as between the parties, their creditors, or for the purpose of the reorganization of the leaseholder under the Bankruptcy Laws, are not equivalent to conveyances in fee with reservations of liens or qualified titles as mere security for the payment of moneys.

III.

The Treatment of Leases as Demises of Possessory Rights Is Provided for in the Bankruptcy Laws and Is Sustained by Decisions of This Court in Railroad Reorganizations. In So Far as the Decision of the Circuit Court Departs from Such Treatment, the Exercise of This Court's Power of Supervision Is Called For.

As pointed out (p. 23, *supra*), the Opinion of the Circuit Court states, in effect, that Pennsylvania statutes cannot forbid or delimit the jurisdiction of a federal bankruptcy court (Opinion, R. 948).

This statement was made in discussing the leases made by Petitioners and seems to carry the implication that Pennsylvania statutes and decisions, holding the leases to be valid demises of possessory rights only, impinge on the treatment of such leases by the federal bankruptcy laws.

But the bankruptcy laws recognize the validity of leases, provide how they shall be treated, and preserve the ownership of the lessors in the fee.

Chapter X of the Bankruptcy Act, Section 106 (7) defines executory contracts, as follows:

> "(7) 'executory contracts' shall include unexpired leases of real property;" [11 U.S.C.A. § 506 (7)].

Section 116 (1) provides that the Judge may "permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties

in interest as the judge may designate;" [11 U.S.C.A. § 516 (1)].

Leases of railway properties are not "contracts in the public authority", and can be rejected: *In Re Chicago Rapid Transit Co.,* 129 F. (2d) 1, 8, (C.C.A. 7, 1942).

Section 216 (4) provides that a plan of reorganization "may provide for the rejection of any executory contract except contracts in the public authority;" [11 U.S.C.A. § 616 (4)].

It is evident from the terms of the Bankruptcy Law that rejection of a lease is to be followed by repossession by the lessor.

Chapter X, § 202, of the Bankruptcy Act reads, in part, as follows:

> "* * * The claim of the landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be provable, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by such lease for the three years next succeeding the date of *the surrender of the premises to the landlord or the date of reentry of the landlord,* whichever first occurs, whether before or after the filing of the petition, plus unpaid accrued rent, without acceleration, up to such date of surrender or reentry: * * *." [11 U.S.C.A. § 602]. [Italics supplied.]

The procedure followed under the parallel provisions of Section 77 of the Bankruptcy Act, dealing with railroad reorganizations, shows the accepted method of dealing with burdensome leases. That method is to reject them and return the leased properties to the lessor,

unless an offer for the purchase or lease of such properties under new terms is accepted by the lessor.

In *Palmer, et al. v. Connecticut Railway & Lighting Co.* (1941), 311 U.S. 544, involving the reorganization in bankruptcy of a railroad company, the lease of a street railway property was rejected, the property returned to the lessor, and the lessor permitted to file a claim for damages, by reason of the rejection of the lease. In this case, this Court upheld the validity of long-term leases in these words (p. 555)—

> "Litigation over a 999-year lease naturally brings up incidents difficult to reconcile with known and established legal formulae. Since conveyancers and business men alike have long utilized the characteristic provisions of leases to accomplish transfers of rights in real estate for extensive periods without payment of the purchase price, *such long term agreements have become a well recognized legal implement, especially in corporate realty transactions and railroad consolidations and mergers. Its reservations of rent, provisions for taxes and operation are firmly embedded in our financial, corporate and title structures.* * * *." [Italics supplied].

The Circuit Court of Appeals would, it appears (Opinion R. 948), upset the integrity of long-term railway leases, as established by this Court and embedded in our financial and title structures. Stocks of lessor railroad corporations are listed and prices quoted in daily and Sunday New York newspapers, under the heading "Guaranteed Stocks", and are traded in extensively. Such stocks are authorized investments for life insurance companies in New York (27 McKinley's Consolidated Laws of New York, Par. 81).

In *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co.* (1943), 318 U.S. 523, a railroad reorganization proceeding, a lease of a railroad was ordered to be rejected, unless a new offer, made to the lessor, was accepted.

In the reorganization of the *New York, New Haven & Hartford Railroad,* the lease of the Boston and Providence properties was rejected and an offer to purchase these properties was made, conditioned on approval by the lessor: *In re New York, N. H. & H. R. Co.* (1943), 54 Fed. Supp. 595, affirmed by the Second Circuit Court of Appeals in *In re New York, New Haven & Hartford R. Co.* (1945), 147 F. (2d) 40, 51.

This Court recently, in the case of *Smith v. Hoboken Railroad, etc.,* decided April 29, 1946, 90 L. Ed Adv. Ops. 880, held that the lessor could not exercise his right of forfeiture where the properties were in possession of the lessee in the course of railroad reorganization. This Court said in its Opinion (90 L. Ed. Adv. Ops. 886):

> "* * * The Commission [Interstate Commerce Commission] may decide that it is in the public interest as well as in the interest of the private claimants that a lease be adopted. * * * Or it may conclude, as it did in Group of Institutional Investors v. Chicago, M. St. P. & P. R. Co. supra (318 U.S., pp 546-555, * * *), that a lease should be rejected unless the lessor consented to a revision of its terms. * * *."

In Re Chicago Rapid Transit Co., 129 F. (2d) 1, (C.C.A. 7, 1942), the Court permitted the rejection by a street railway company in bankruptcy reorganization of the lease of an elevated railroad, a part of its system. The Court said, at page 6:

> "* * * It could reject the lease and free the estate of the burden thereof. It could not order abandonment of service. It could not make a new contract between the parties. * * *"

This Court, in a case arising out of the present bankruptcy proceedings, clearly indicated that the proper method of dealing with leases, involved in this proceeding, was either by affirmance or rejection thereof by the Trustees of the Debtor or by forfeiture of the leases by the lessors. This Court said:

> "Notwithstanding the fact that § 77B gives no specific authority to trustees in reorganization to reject burdensome leases or contracts,* it is well settled that they have that right and are accorded a reasonable time within which to exercise it. If, in the opinion of the officers of the underlying companies, a reasonable time has expired those companies are not without redress. They may declare a forfeiture of the leases and abrogate the agreements for nonperformance on the part of the trustees or, they may apply to the District Court to compel an election by the trustees, to affirm or disaffirm. * * *." (*Philadelphia Company v. Dipple* (1941), 312 U.S. 168, 174.

There is nothing in the Bankruptcy Statutes, or in any of the decisions interpreting and applying them, which authorizes leases of intrastate utilities, authorized by state laws, to be ignored and the properties of independently owned companies to be treated as the properties of a Debtor for the purpose of reorganization.

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* Such authority is now conferred by Chapter X, (*supra*, p. 27).

In so far as the opinion of the Circuit Court of Appeals sanctions a treatment of leases, other than that provided for by Congress, it is a departure from the accepted and usual course of judicial proceedings in bankruptcy reorganization.

Admittedly without judicial precedent (Opinion, R. 950) and, as we have shown, contrary to the provisions, with respect to leases, in the Bankruptcy laws, the Circuit Court appears to hold that the properties of lessor corporations may be treated as the properties of an operating corporation in bankruptcy reorganization.

It is submitted that this raises an important question of federal law which should be settled by this Court.

IV.

In So Far as the Decision of the Circuit Court Holds That, Without Filing and Approval of Petitions by or Against Them, Petitioners Can Be Reorganized in Bankruptcy or Their Properties Dealt With as Properties of a Debtor, the Decision Has so Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision.

The fifth Conclusion of Law of the Master, adopted by the District Court, is, as follows:

> "5. Without the filing and approval of petitions by or against the several underliers in the manner and form prescribed by the Act of Congress relating to Bankruptcy, this court does not have jurisdiction to reorganize such underliers under such Act or to deal with their properties as though

they were the properties of a 'debtor' as the term 'debtor' is defined in such Act." (R. 837).

The Opinion of the Circuit Court states, in effect, that the single, but very important, legal question in this case "relates to the power of the court to grant the City's petition by pulling into the [re]organization, willy nilly, the underliers." (Opinion, R. 943).

Our contention is that Petitioners can not be pulled into bankruptcy reorganization proceedings "willy", unless they file voluntary petitions to that end; and can not be pulled in "nilly", unless petitions are filed against them by three or more creditors. No such petitions have been filed.

Congress has provided the procedure for putting corporations into reorganization in bankruptcy and has stated the financial condition of a corporation requisite to justify such proceedings.

Section 126 of Chapter X of the Bankruptcy Act reads, as follows:

> "A corporation, or three or more creditors who have claims against a corporation or its property amounting in the aggregate to $5,000 or over, * * * may, if no other petition by or against such corporation is pending under this chapter, file a petition under this chapter." [11 U.S.C.A. § 526].

Chapter X sets forth what facts the petition must state, among others as follows:

> *"Section 130.* Every petition shall state—
>
> "(1) that the corporation is insolvent or unable to pay its debts as they mature;" [11 U.S.C.A. § 530].

> *"Section 131.* A creditors' or indenture trustee's petition shall, in addition to the allegations required by Section 130 of this Act, state—
>
> "* * *
>
> "(5) that the corporation has committed an act of bankruptcy within four months prior to the filing of the petition." [11 U.S.C.A. § 531].

The opinion of the Circuit Court (R. 944) states that the Guaranteed Underliers (which include Petitioners) are not insolvent. The Special Master and the District Court found as a fact that it did not appear that Petitioners were unable to pay their debts as they mature (SMR par. 57, R. 631). It is not pretended that either of Petitioners has committed an act of bankruptcy.

No petition can be filed in behalf of a corporation except by persons authorized so to act. This was recently so held by this Court in the case of *Price v. Gurney* (1945), 324 U.S. 100. This Court said, at page 107:

> "* * * But nowhere is there any indication that Congress bestowed on the bankruptcy court jurisdiction to determine that those who in fact do not have the authority to speak for the corporation as a matter of local law are entitled to be given such authority and therefore should be empowered to file a petition on behalf of the corporation. * * *."

It may be contended that Petitioners are "subsidiaries" under the definition in Section 106 (13) [11 U.S.C.A. § 506] of Chapter X of the Bankruptcy Law as "* * * a corporation substantially all of whose properties are operated under lease or operating agreement, * * *." This definition is stated to be only for the purposes of Chapter X [11 U.S.C.A. § 506]. The only section of Chapter X where the word "subsidiary" is

used, other than that wherein it is defined, is Section 129 [11 U.S.C.A. § 529], which provides that a petition by or against a subsidiary may be filed "in the court which has approved the petition by or against its parent corporation". The statutory definition of "subsidiary", above referred to, has no application whatsoever in these proceedings; because no petition has been filed by or against either of Petitioners and none is in prospect.

Just before the final printing hereof, we learned of a decision by the Circuit Court of Appeals for the Third Circuit which was filed July 17, 1946, as amended by order of July 23, 1946, and which is not yet officially reported. The case is entitled *"New York Trust Company, as Trustee of The New York and Greenwood Lake Railway Company Prior Lien Mortgage Deed dated May 1, 1896, v. The New York and Greenwood Lake Railway Company."*

The Opinion states (p. 5)—

> "The substantial problem on this appeal is which of the two District Courts (Ohio and New Jersey) has authority to pass upon the fees requested * * *."

The reason for our calling attention to this case is that it quotes from and appears to rely upon the opinion of the Circuit Court in the case at bar, as justifying the bringing into the reorganization of a railroad company in bankruptcy of a subsidiary of the Debtor, without the filing of a petition in bankruptcy reorganization by or against the subsidiary.

This application of the decision of the Circuit Court in the case at bar, we believe, constitutes a cogent

reason for the grant of our Petition; because of the importance of settling an important question in the application of the bankruptcy laws.

The decision in the case cited is that a claim for services in the reorganization of a railroad corporation in bankruptcy should be heard and decided by the bankruptcy court. Why that should require the reorganization therein of the Greenwood Railway does not appear.

The facts in the case cited are essentially different from those in the case at bar, thus:

(1) Claimants had participated in the Erie Railroad bankruptcy proceedings as general parties and had been allowed fees for services; whereas Petitioners have made no claims in the present proceedings and appeared specially therein only in support of their petitions to dismiss the City's petition, as to them;

(2) Erie Railroad Company owned 95% of the stock of Greenwood Railway and 98.4% of its bonds; whereas, Pittsburgh Railways owns none of the stock of Petitioners and none of their bonds;

(3) Erie Railroad held a 999 year lease from Greenwood Railway; whereas, Debtor was merely in possession of Petitioners' street railways under short-term operating agreements with their lessees.

The Purpose and Subject-Matter of Bankruptcy Reorganization.

The purpose of bankruptcy reorganization of a corporation has been described in *Sartorius v. Bardo,* 95 F. (2d) 387, 389, (C.C.A. 2, 1938), as follows:

"A proceeding under Section 77B seeks the rehabilitation of the *debtor,* and can have no further purpose; as soon as it appears that this is impossible, subdivision (c) (8) declares that the court 'may' dismiss it, or proceed to liquidation. * * *" [Italics supplied]

The subject-matter of reorganization is stated in the case of *In Re Chicago R. I. & P. Ry. Co.,* 50 F. Supp. 835, D.C.N.D. Illinois (1943) at page 849, as follows:

"* * * What is the subject-matter of reorganization? Obviously, it is not the lines of railway which are being reorganized, but the debtor's financial structure. * * *"

The Opinion of the Circuit Court of Appeals says that "the facts of the present case call for the treatment of this great transportation system as one entity for purposes of reorganization, * * *." (Opinion, R. 951).

But Congress has provided for the reorganization in bankruptcy of corporations, not systems or lines of railway. Congress has provided only for the reorganization in bankruptcy of corporations which are insolvent or unable to pay their debts as they mature; and then, only by petitions filed and approved by or against them.

It is submitted that Monongahela and Birmingham can not be reorganized in bankruptcy, unless petitions by or against them are filed and approved and the facts set forth therein, as required by the Bankruptcy Act.

It is further submitted that, unless Petitioners are subjected to bankruptcy reorganization, their properties can not be dealt with as the properties of a debtor in reorganization.

Conclusion.

It is submitted that the Decree of the District Court, dismissing the Petition of the City of Pittsburgh, should be sustained; that the Circuit Court of Appeals erred in reversing that Decree and remanding the case for further proceedings not inconsistent with its Opinion; and that the Orders and Decrees of the Circuit Court of Appeals should be reversed.

It is further submitted that this Petition for Writs of Certiorari should be granted; because the decision of the Circuit Court of Appeals conflicts with the decisions of other Circuit Courts of Appeals; decides an important question of local law in a way in conflict with applicable local decisions; decides an important question of Federal Law which has not been, but should be, settled by this Court; decides Federal questions in a way in conflict with applicable decisions of this Court; and has so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

WM. S. MOORHEAD
A. W. HENDERSON
JUDSON A. CRANE
Attorneys for Petitioners.

JOINDERS IN THE FOREGOING PETITION FOR WRITS OF CERTIORARI.

The following named corporations severally join in the foregoing Petition for writs of certiorari and adopt the foregoing Brief.

Each of the undersigned corporations leased its street or incline railway properties to Pittsburgh and Birmingham Traction Company, one of the Petitioners to the foregoing Petition (SMR 71, R. 636). Said leases are in full force and effect and the demised premises are in the possession of the Trustees for the Debtor in these proceedings, under operating agreements. Each of the undersigned corporations made a motion to dismiss, as to it, the petition of the City of Pittsburgh (R. 880-884). Each joined in the Brief filed by the above named Petitioners with the Circuit Court of Appeals on the appeal of the City.

PITTSBURGH AND BIRMINGHAM PASSENGER RAILROAD COMPANY,

THE SOUTH SIDE PASSENGER RAIL ROAD COMPANY,

By Wm. S. Moorhead.....

Wm. S. Moorhead, their attorney,
1732 Oliver Bldg., Pittsburgh, Pa.

PITTSBURGH INCLINE PLANE COMPANY,

By W. St. Clair Childs.....

W. St. Clair Childs, its attorney,
207 Oliver Bldg., Pittsburgh, Pa.

The Suburban Rapid Transit Street Railway Company joins in the foregoing Petition for writs of certiorari and adopts the foregoing Brief.

The undersigned leased its street railway properties to Consolidated Traction Company, by a lease similar to the leases of the above named Petitioners. The material parts of the Suburban lease and guaranty are printed in R. 922-937, inclusive. The lease is in full force and effect. (R. 937; SMR par. 840, R. 796.) The demised premises are in the possession of the Trustees for the Debtor in these proceedings.

Philadelphia Company owns 6.6% of the capital stock of Suburban, the balance being owned by the public. (SMR par. 26, R. 618.) In all material respects the position of Suburban is the same as that of the Petitioners.

The undersigned made a motion to dismiss, as to it, the petition of the City of Pittsburgh (R. 17 a) and filed a brief with the Circuit Court of Appeals on the appeal of the City.

THE SUBURBAN RAPID TRANSIT STREET RAILWAY COMPANY,

By ...Richard W. Ahlers.....

Richard W. Ahlers, its attorney,
1310 Commonwealth Building,
Pittsburgh 22, Pa.

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY, Debtor.

NO. 362.

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

v.

JULES GUGGENHEIM ET AL.

NO. 363.

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

v.

CITY OF PITTSBURGH

NO. 364.

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

v.

HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee, etc.

REPLY BRIEF OF MONONGAHELA AND BIRMINGHAM IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

This Reply Brief is filed in behalf of the above-named Petitioners (hereinafter referred to, respectively, as Monongahela and Birmingham) and in behalf of those corporations which joined in the petition for writs of certiorari of Monongahela and Birmingham.

This Reply Brief is directed to the briefs, filed by the City of Pittsburgh, Jules Guggenheim, et al., and

Horace F. Baker, et al., in opposition to the granting of the petitions for certiorari.

No threat to unified operation of the street railway lines in Pittsburgh and environs.

All of the briefs in opposition dwell upon the importance of unified operation of the street railways in Pittsburgh and environs and assume that the dismissal of the City's petition would result in the separate operation of the lines owned by various so-called Underlying Companies. Such an assumption is not warranted and ignores the realities of the situation. Neither the dismissal of the City's petition nor the dismissal of the bankruptcy reorganization proceedings, In the Matter of Pittsburgh Railways, would disturb in any material way the unified operation of the street railways in Pittsburgh and vicinity, as it has been conducted for over 44 years. Philadelphia Company (hereinafter referred to as "Philadelphia") said in its brief in the court below (p. 49):

> "There is no threat to sever unified operation, * * *."

Monongahela and Birmingham do not oppose the operation of their street railway properties as parts of a unified system, nor does either of them propose to operate its lines separately.

Philadelphia guaranteed to Monongahela and Birmingham, respectively, the maintenance and operation in public use of the demised railways equipped with the best and most improved equipment for the operation thereof (R. 893, 894).

Monongahela and Birmingham will see to it that Philadelphia carries out its guaranties. Being required so to do, Philadelphia will, of course, operate petitioners' extensive lines of street railway as parts of a unified system, comprising the other lines of street railway in the Pittsburgh District which it controls through stock ownership.

Philadelphia is a financially strong company and should not be permitted to, if it would, escape its obligations through the bankruptcy proceedings of its wholly owned subsidiary, Pittsburgh Railways.

There is no dispute as to the Master's finding that the management of the Pittsburgh railways system has heretofore rendered and still is rendering "* * * a very high standard of service to the public." (SMR Par. 773, R. 781).

The argument *in terrorem* of the respondents is, therefore, entitled to no weight.

The street railways system of Pittsburgh and environs is not unusual in so far as long-term leases are concerned.

The City characterizes this as an unusual case. In so far as the lease method is concerned, it is not unusual at all. In an Article entitled "Railroad Leases and Reorganizations" (1940), 49 Yale Law Journal 626, it is stated that 60% of the nation's Class I railroads are lessees. It is stated, further, that of existing railroad leases made prior to 1920, the greater part were for 99 years or more (p. 631).

The Chandler Act provides how leases shall be treated in reorganization proceedings (See pp. 27 and 28 of our petition).

This Court has said that long-term leases, accomplishing transfers of rights in real estate without payment of purchase price, are firmly embedded in our financial, corporate and title structures: *Palmer, et al. v. Connecticut Rwy. & Lighting Co.* (1941) 311 U.S. 544, 555.

As to the simplification of the corporate structure of the system.

The City (p. 2) quotes the opinion of the Circuit Court as referring to the Pittsburgh transportation system as "* * * the elaborate jig-saw puzzle arrangement * * *."

The corporate structure of the Pittsburgh railways system was erected by Philadelphia. It controls by stock ownership the Debtor and many other street railway corporations. It is guarantor of the leases made by Monongahela and Birmingham to Consolidated Traction Company and United Traction Company of Pittsburgh, respectively.

Philadelphia is a public utility holding corporation and any desirable simplification of its corporate structure should be under proceedings by the Securities and Exchange Commission under the Public Utility Holding Company Act of August 16, 1935, c. 687, Title I, 49 Stat. 803; 15 U.S.C.A. §§ 79 *et seq.*

It can not be attained in the present proceedings.

The District Court held that it had jurisdiction to determine, and did determine, the rights, titles, and interests of the underliers.

The City states in its brief (p. 24) that "* * * the City's petition raises only the issue of bankruptcy jurisdiction and does not affect the parties' substantive property rights; * * *." This statement and other statements in the City's brief to the same effect confuse the issue which petitioners desire to place before this Court.

The District Court, in adopting the Conclusions of Law of the Special Master, held that it *had* jurisdiction "* * * to determine what are the rights, titles and interests of the debtor in respect of the properties in the custody of this court and to determine, to the extent necessary for the purposes of this reorganization proceeding, what are the rights, titles and interests of the underliers and their stockholders, creditors and indenture trustees respecting those properties." (SMR, page 228, R. 836).

The Court then held, in effect, that the facts did not justify the disregarding of corporate entities; that the leases in question were not equivalent to conveyances in fee, and that the properties leased by the underliers were not the properties of the Debtor, its rights therein being based on the provisions of the leases and the operating agreements.

The question involved in this case is not one of jurisdiction to determine the issues raised; but the correctness of the determinations of the lower court.

It is true that the District Court, in adopting the Conclusions of Law of the Special Master, held that "Without the filing and approval of petitions by or against the several underliers in the manner and form prescribed by the Act of Congress relating to Bankruptcy, this court does not have jurisdiction to reorganize such underliers under such Act or to deal with their properties as though they were the properties of a 'debtor' as the term 'debtor' is defined in such Act." (SMR, page 229; R. 837).

As to the leases made by Monongahela and Birmingham.

We have pointed out at pages 21 to 26 of our petition that these leases were authorized by Pennsylvania statutes and were held to be demises of possessory rights only, by Pennsylvania decisions. At pages 27 to 32 of our petition, we have pointed out that the treatment of leases as demises of possessory rights is provided for in the bankruptcy laws. As we read the opinion of the Circuit Court of Appeals, it does not seriously or directly question the correctness of these decisions, except to say that, "The Pennsylvania statutes do not, nor could they, forbid or delimit the jurisdiction of a federal bankruptcy Court." (R. 948).

But neither the Pennsylvania statutes nor the leases, themselves, delimit the jurisdiction of a federal bankruptcy court; because the bankruptcy laws provide how leases shall be treated. The treatment provided is either affirmance or rejection of the leases.

All replacements, additions, and substitutions of the leased property belong to the lessors.

The brief for respondents Baker, et al., (p. 8), points out that various repairs, replacements, and substitutions of the property originally leased by Monongahela and Birmingham have been made by the lessees, as required by the leases, or by the Debtor, as required by its operating agreements. The statement is then made (p. 8) that the lessee was required to deliver to the lessor "* * * upon termination of the lease only 'like or similar personal property of value equal to the amount of said inventory' which was to be made at the beginning of the lease (See Monongahela Street Railway Company lease, Ex. 3, Document 6)."

Paragraph Fourteenth of the Exhibit referred to, which appears at page 898 of the Record, provides what shall be done upon the termination of the lease. It provides that Monongahela may enter upon and thenceforth have, hold, possess, and enjoy "* * * the hereby demised premises, or such as may be *substituted in their place* and form the subject of this Lease, and take possession of the same, with the appurtenances and with all *additions and improvements thereon,* * * *." (Italics supplied)

The lease made by Birmingham contains a similar provision (R. 908).

These provisions of the leases, we submit, dispose of any question as to the ownership by the lessors of substitutions, additions, and improvements.

The reversal of the District Court by the Circuit Court of Appeals is based mainly, if not entirely, on the disregard of the corporate entities of the underliers.

The gravamen of the decision of the Circuit Court of Appeals is as follows (R. 947):

> "As we see the question, the issue is whether the demand of the facts is to control or whether obeisance must be made to the doctrine of the separate corporate entities of all these concerns which, from the business point of view, constitute one operation and one enterprise * * *."

The final decision of the Circuit Court was to "* * * override the arguments for the recognition of the legal concept of separate entity on the part of the underliers." (R. 952)

We do not speak for other so-called underliers; but, as to Monongahela and Birmingham and the other so-called guaranteed underliers, there is no basis whatsoever for disregarding their separate corporate entities.

As pointed out in our petition, at page 19, not a share of stock of Monongahela or Birmingham is owned by Debtor. Nor is any of their stock owned by Philadelphia or its subsidiaries, except a 24.7% interest in the stock of Monongahela, acquired by Philadelphia or some of its non-railway subsidiaries after the institution of these bankruptcy proceedings. There is no interlocking control by officers, directors, or otherwise, by Debtor or Philadelphia of Monongahela or Birmingham.

In addition to this, the disregard of the corporate entities of Monongahela and Birmingham would not bring their properties into the reorganization proceedings. If the entity of a corporation is disregarded, its stockholders, whether they be one or more, are treated as the owners of the corporate property. Such a treatment would carry the ownership of the properties of Monongahela and Birmingham to the large number of members of the public who own their respective stocks.

The disregard of the corporate entities of Monongahela and Birmingham, therefore, would not bring the properties of those corporations into the reorganization proceedings. It would get these proceedings nowhere.

The theory of equitable merger and consolidation of the so-called underliers is not applicable to Monongahela and Birmingham.

The Guggenheim brief advances the theory that an equitable merger and consolidation has been effected by what is described as a "Unity of life of debtor and of all underliers * * *" (p. 11). It is not clear how corporations are merged or consolidated under this theory.

The Guggenheim brief states—"By piercing the corporate veil of the indenture (contracting) parties and their privies, a merger is effected." (p. 17)

Just what "piercing the corporate veil of the indenture (contracting) parties" means is difficult for us to fathom. It does not seem to mean disregarding the corporate entities of the contracting parties; for a corporate merger could only occur as between recognized corporations. It is not clear which would be the surviv-

ing corporation of the alleged merger—the lessor, the lessee, the lessee's operating company, Pittsburgh Railways, or its parent company and guarantor of the leases, Philadelphia Company.

The brief of Baker, et al., speaks of "* * * a merger in fact of the assets of the Pittsburgh Railways Company and the underlying companies, * * *." (p. 8)

The City does not appear to adopt the merger theory (p. 3).

The opinion of the Circuit Court does not rest on the basis of a merger or consolidation.

If the merger theory is based on the ownership by the Debtor of substantially all of the stock of an underlier, it is not applicable to Monongahela or Birmingham; because there is no such ownership of their stock either by the Debtor or its parent, Philadelphia. The disregard of the corporate entities of Monongahela and Birmingham does not carry their properties to the Debtor.

If the merger theory stems from the long-term leases made by Monongahela and Birmingham to Consolidated Traction Company and United Traction Company of Pittsburgh, respectively, a surprising and totally untenable situation is arrived at. A simple example will clarify this statement.

Suppose Corporation A owns in fee a lot on which it has erected a large and fully-equipped building. As is often done, it makes a long-term lease of the land and building to Corporation B without any cash payment, but in consideration of the payment of rentals by B in the future and its covenants to operate the building and make suitable repairs and replacements thereto and

thereof. After a period of years, B becomes insolvent and goes into bankruptcy reorganization. A is free of debt, but B owes debts of $1,000,000 in excess of its assets.

If the lease results in the merger or consolidation of A and B, then the creditors of B have a claim prior to the stockholders of both A and B on the land and buildings, or on the proceeds of the sale thereof.

If anything is left, it goes to the stockholders of A and B. That would be all that the stockholders of A would receive for the land and building which their money bought and erected, and which were leased without the payment of any purchase price.

Under the merger theory, the stockholders of Monongahela and Birmingham would be in virtually the same situation as the stockholders of Corporation A in the example.

Under the bankruptcy statutes, however, the Trustees of Corporation B would be required either to affirm the lease, under the provisions thereof, or to reject the lease and return the property to Corporation A.

In Pennsylvania, there are statutes providing for both merger and consolidation of corporations with the required approval of stockholders and the issuance of securities to them. Admittedly, the statutory merger proceedings were not followed (City's brief, p. 3).

It is not pretended that there was any intention or attempt by the parties to the Monongahela and Birmingham leases to comply with the requirements of a statutory merger, by reason of which it might be claimed that a "de facto" merger had resulted in analogy to the doctrine of "de facto" corporations.

Both Monongahela and Birmingham own and formerly operated completely integrated street railway systems.

In the City's brief, the following statement is made at page 23:

> "Here, as has been shown, each underlier owns but an inoperable segment of a unified system."

Monongahela leased to Consolidated Traction Company and Birmingham leased to United Traction Company of Pittsburgh a completely integrated street railway system, fully equipped with car houses, cars, tracks, trolley lines, and poles, together with real estate and francnises. The Monongahela lease and the Birmingham lease were both duly recorded and the material parts thereof appear in the Record at pages 885 and 901, respectively.

The properties owned by Monongahela and now in operation include 54.5 miles of track, 13 parcels of real estate, and a car house (SMR, par. 850, R. 798). It reaches the downtown business triangle by a long term trackage agreement with Consolidated Traction Company which was preserved in the lease (R. 895).

The properties owned by Birmingham and now in operation include 24.8 miles of track, and extend from the downtown triangle of Pittsburgh across the Monongahela River to the South Hills (SMR, par. 852, 855, R. 799).

The City states in its brief at page 5 that it will supply the Chief Justice and Justices of this Court with a map showing the franchise locations of each underlier.

As showing the strategic location and extensive properties of Monongahela and Birmingham, we propose to furnish to the Chief Justice and Justices with this Reply Brief a reproduction of a map received in evidence in this case as Exhibit P-70, showing the lines of street railway system owned by Monongahela, its trackage rights to the downtown business district of Pittsburgh, as well as the street railway system owned by Birmingham, all presently in operation.

Of course, Monongahela's and Birmingham's railways are separately "operable". They were successfully and profitably so operated by those companies prior to the leases (R. 393 a, 394 a; SMR par. 880, R. 803).

Philadelphia guaranteed the equipment of the leased lines with the best and most improved equipment for the operation thereof (R. 893, 894) and the ownership by the lessors of all substitutions, additions, and improvements (R. 898, 908).

The leases made by Monongahela and Birmingham are not subject to modification, impairment, or termination by the Pennsylvania Public Utility Commission.

The City's brief (p. 28) quotes from an opinion of the Pennsylvania Public Utility Commission on the first Plan of Reorganization proposed by the Trustees of Debtor. That opinion was rendered in connection with the disapproval of that Plan.

The opinion is there expressed that the reorganized company should conduct all transportation service, by street railway and bus, in the Pittsburgh district. Such, however, is the present situation, with respect to street

railway transportation, and there is no threat of any change therein, as heretofore noted (p. 2, *supra*).

After pointing out that the main purpose of the Public Utility law is to secure "* * * to the public, using and desiring to use them [public utility facilities], reasonably adequate service and facilities at fair and reasonable and nondiscriminatory rates", the opinion continues—

> "Observing the limitation thus placed on our authority, we have not given consideration to the fairness of the Plan of Reorganization in respect of creditors and security holders * * *": *Re W. D. George et al. Trustees of Pittsburgh Railways Co.* (1940), 38 P.U.R. (NS) 434, 437.

We, therefore, submit that this opinion has nothing to do with the issues in this case.

A footnote, at page 29 of the City's brief, seems to argue that the Pennsylvania statutes authorizing the leases made by Monongahela and Birmingham, and those leases themselves, are subject to the regulatory powers of the Commission.

That such is not the case, particularly with respect to leases made before the first Public Service Company Act of July 26, 1913, P. L. 1374, has been decided directly in a number of decisions by the Supreme Court of Pennsylvania.

In the case of *New Street Bridge Co. v. Public Service Commission et al.,* (1921) 271 Pa. 19, the Supreme Court said, at pages 31 and 32:

> "* * * The public is not concerned with a good or bad bargain between lessor and lessee. What they do demand in a complaint such as this,—

and have a right to demand,—is adequate service at reasonable rates, and no more. This is worked out through the duly created substitute on the ground, in visible ownership and occupation of everything in which the public is vitally interested.

"Viewing the question, then, in this light, if the bridge company had leased its entire property and franchise, or had leased a certain part of its property, absolutely to the transit company, divesting itself of all control over the property and franchise for operating purposes for a given time, it would not be within the power of the commission, in a direct proceeding against the bridge company, the underlying company, to reduce the rental. * * *."

Citizens Passenger Railway Co. v. Public Service Commission et al., (1921) 271 Pa. 39, was decided on the same day as the *New Street Bridge* case and followed that decision. The Court said, at page 56:

"Besides, neither the commission nor the public has anything to do with the disposition of the rates which the utility is authorized to collect; nor is it any concern of either that the sum total thereof may not be sufficient to enable the operating company to pay its fixed charges and maintain or extend its service and facilities. The company is entitled to receive a reasonable return for the service it furnishes, and no more; the public is entitled to receive an adequate return for the reasonable rates it pays, and no more. Beyond making sure of these two things, the statute does not vest a greater power in the commission, so far as the matter under consideration is concerned. * * *."

In *Bell Telephone Company of Pa. v. Driscoll et al.*, (1941), 343 Pa. 109, the Supreme Court had to do with the Public Utility Law of 1937, as amended in 1938 (66 PS § 1272). In that case, the Supreme Court held that § 702 of the Public Utility Law, as amended, which requires commission approval of a contract between a public utility and an affiliated interest as a precedent to its validity, is unconstitutional on the ground that it unlawfully delegates legislative powers to the commission.

The agreements of lease made by Monongahela and Birmingham, not having been entered into with affiliates and having been executed long before the creation of any Pennsylvania Public Utility Commission, stand on a stronger basis than the contracts involved in the *Bell Telephone* case.

We submit, therefore, that the Monongahela and Birmingham leases, having been authorized by Pennsylvania statutes, are not subject to modification, impairment, or termination by the Public Utility Commission of Pennsylvania.

Without the filing and approval of petitions by or against Monongahela or Birmingham, they can not be reorganized in bankruptcy proceedings or their properties dealt with as the properties of a debtor in bankruptcy.

This proposition is discussed at pages 32 to 37 of the petition of Monongahela and Birmingham for writs of certiorari.

The only facts which we emphasize here are as follows:

1. Monongahela and Birmingham are solvent and able to meet their debts as they mature; although the Amended Revised Plan of the Trustees was based on the erroneous assumptions that they were insolvent (R. 570) and that petitions for reorganization would be filed by or against them (R. 560).

2. There is no basis for or prospect of petitions for reorganization in bankruptcy being filed by or against them.

3. Neither Monongahela nor Birmingham has filed any claim in the Matter of the Pittsburgh Railways Company, Debtor.

4. Neither Monongahela nor Birmingham has participated in the present proceedings; both having appeared specially therein only in support of their petitions to dismiss the City's petition as to them.

5. Neither Monongahela nor Birmingham has any contractual relations with Pittsburgh Railways Company, their leases having been made to Consolidated Traction Company and United Traction Company of Pittsburgh, respectively, and those lessees having made short-term operating agreements with Pittsburgh Railways Company, with respect to the operation of the lines covered by the two leases, among others.

6. Neither Monongahela nor Birmingham is controlled, directly or indirectly, by stock ownership or otherwise, by Debtor or Philadelphia.

Under these facts, which are admitted or not questioned, it is submitted that a bankruptcy court has neither jurisdiction nor power to reorganize these companies under the bankruptcy laws.

Conclusion.

It is submitted that, in so far as Monongahela, Birmingham, and those corporations which joined in their petitions for writs of certiorari are concerned, the Circuit Court of Appeals erred in reversing the Decree of the District Court and remanding the case for further proceedings not inconsistent with its opinion; that the orders and decrees of the Circuit Court of Appeals should be reversed, in so far as they apply to those petitioners; and that the decree of the District Court dismissing the petition of the City of Pittsburgh as to them should be sustained.

It is further submitted that the petition by Monongahela and Birmingham for writs of certiorari should be granted, for the reasons stated therein and in the brief attached thereto.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY,
Debtor.

No. 359

PHILADELPHIA COMPANY, Petitioner,

vs.

JULES GUGGENHEIM, et al.

No. 360

PHILADELPHIA COMPANY, Petitioner,

vs.

CITY OF PITTSBURGH.

No. 361

PHILADELPHIA COMPANY, Petitioner,

vs.

HORACE BAKER and JOHN A. BEATTIE, Protection Committee for the Southern Traction Company 50 year First Mortgage and Collateral Trust 5% Gold Bonds.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement.

In this bankruptcy reorganization pending since 1938, the petitions for certiorari are directed against a decision of the Circuit Court, which, acting on a petition of the City

of Pittsburgh, Pa., filed in the District Court in 1942, pierced the corporate veil of the various corporate units or divisions of the system of transportation in Pittsburgh, Pa., unified for approximately half a century. The petitioners contend that separate reorganization petitions (25 in number) should be filed by or against each underlier, which petitioners refuse to do, although that is within their power.

The petitioners are: Philadelphia Company, parent of debtor and of 36 divisions, called the 36 Philadelphia underliers; Monongahela, in which Philadelphia has a 24.7% interest stock, and Pittsburgh & Birmingham, with their subsidiaries. They are joined by Suburban, by Pittsburgh Incline and by South Side Passenger. Together they are called the guaranteed underliers, 9 in number.

The District Court said that "The system should be reorganized as a unit if it can legally be done", acknowledged that the "general purpose of the (City's) petition was to facilitate reorganization" and then dismissed the City's petition as recommended by the Special Master. The District Court's opinion is reported at 60 Fed. Supp. 600. Three separate appeals were taken to the Circuit Court:

No. 8964: Jules Guggenheim, et al. on behalf of ourselves and all similarly situated Public Security holders of debtor and of underliers.

No. 8967. City of Pittsburgh.

No. 8996. Horace F. Baker, et al., Debtor's Bondholder Committee.

The three appeals were heard together. The Circuit Court unanimously reversed; its opinion is reported at 155 Fed. (2) 477. No petition for rehearing was filed below.

W. D. George, a trustee of the debtor, petitioned the Circuit Court for clarification of its opinion. That petition,

restating arguments in the Circuit Court made by the petitioners and to this court was denied by the Circuit Court. The Transcript of Record accompanying the instant petitions does not contain our opposition to the petition for clarification in the Circuit Court.

The Circuit Court said (155 Fed. (2) 480, 482):

> "All the various corporate units or divisions, by whatever name they are designated, are welded to the operating company, Pittsburgh Railways (the debtor) * * *"
>
> "The community need for the operation of this public transportation system as an integrated unit is clear" (p. 480).
>
> "As we see the question, the issue is whether the demand of the facts is to control or whether obeisance must be made to the doctrine of separate corporate entities of these concerns, which from the business point of view, constitute one operation and one enterprise" (p. 482).
>
> "Since 1938 this system has been in the federal court and operated under trustees appointed by the court. This state of affairs cannot continue indefinitely and be utilized as a means of integration of a transportation system" (p. 480).

This, is but another chapter in the long history of vicissitudes of this unified transportation system.

This is the second time, the debtor, with consent of its parent, Philadelphia, invoked the shelter of the District Court for the Western District of Pennsylvania. An episode of this chapter, over six years old, is presented by this controversy begun in 1942 by the City's petition.

The Underliers.

1913: The Master's finding 391-416 treat with the manner in which the instant parent petitioner, Philadelphia Company, adjusted the deficit of debtor and underliers. New securities were created, some of which came into the hands of the investing public.

1918-1928: A consent equity receivership of debtor was instituted and withdrawn by Philadelphia Company (ff. 453-46).(a) Equity Receiver Fagan opposed lifting the receivership which had not effected any reorganization or any adjustment of the financial difficulties (f. 470) (R. 718). The other equity receiver did not oppose Philadelphia Company's application to terminate the receivership (f. 470) (R. 718). He was George, the debtor's present trustee (f. 470) (R. 718).

1938- ?: On May 10, 1938, debtor filed a voluntary petition for reorganization under Section 77B of the Bankruptcy Act (f. 1) (R. 613). On November 7, 1938, the Chandler Act was made applicable.

The Underliers.

Philadelphia Company's classification of the underliers is misleading (Phiadelphia petition, pp. 7-8). The underliers were *not* so classified by the Circuit Court (155 Fed. (2) 479-480).

Some of these 49 underliers are linked to the debtor by operating agreements that have been in effect since 1902. Others are tied by long term lease agreements (155 Fed. (2) 480).

36 Philadelphia underliers are directly or indirectly controlled by the common parent, Philadelphia Company,

(a) ("f" or "ff" followed by a numeral indicates the Master's finding having that number.)

through stock majorities at various levels and interlocking directorates of various degrees (155 Fed. (2) 480).

9 guaranteed underliers transferred their property and franchises to the Philadelphia underliers in 1902 under 900 year lease device in consideration of the guarantee of such leases by Philadelphia Company. The stock of these 9 guaranteed underliers is publicly controlled. Since the reorganization Philadelphia Company infiltration has occurred in Monongahela, Philadelphia Company owns 24.7% of the petitioner guaranteed underlier Monongahela and 6.6% of the petitioner guaranteed underlier Suburban.

4 underliers transferred their property and franchises in 1896 to one of Philadelphia underliers under 950 year lease device without any guaranty thereof. These 4 are called unguaranteed underliers.

The facts lay bare, that, the issue is not one of jurisdiction, but a contest between classes of creditors.

Pleadings.

The Trustee Reorganization Plan was systemwide. It provides that petitions for reorganization would be filed, not by all of the underlier companies but only by 25 companies (R. 614).

Philadelphia underliers answer to a rule obtained by Trustees, on the underliers and indenture trustees why each underlier should not file a separate petition (f. 484) (R. 617), provided by Philadelphia Company, stated the conditions under which the Philadelphia underliers would go along. The "third condition" related to the guaranteed underliers and required assurances satisfactory to Philadelphia Company preserving any defenses it might assert in mitiga-

tion of its annual liability of $516,422., exclusive of taxes under Philadelphia Company's guarantee (ff. 29, 32, 33, 489) (R. 618, 619, 725).

Subsequently in October, 1942, The City of Pittsburgh petitioned the District Court to exercise jurisdiction in bankruptcy reorganization over all underliers of the debtor —"to determine the rights and interests of all stockholders and as creditors thereof" (155 Fed. (2) 479).

The guaranteed underliers moved to dismiss the City's petition. Each separately stated that each (City Appendix pp. 92-98a incl.):

> "makes no claim in the proceedings on account of dismantling, destroying, abandoning or wearing out by use of trackage power and transmission equipment, car barns or street cars * * *
>
> "Philadelphia Company is a strong corporation financially and amply able to assume and perform its liability under said guarantee."

The unguaranteed underliers conditionally joined in the prayers of the City's petition. The conditions were that hearings be held for consideration of objections and amendments to the Reorganization Plan and to determine the relative substantation rights, priorities, liens, claims and interests of all creditors and stockholders of debtors and of underliers (ff. 891, 1018, 1078) (R. 804, 812, 832). No such hearings were held. Subsequently we instituted and have pending in the District Court, a proceeding to eliminate Philadelphia Company participation in the benefits of Reorganization Plan or to subordinate Philadelphia Company's asserted claims to the claim of Public Security holders (63

Fed. Supp. 7; 64 Fed. 231). If we are successful and the underlier separate corporate form is dishonored, every public security holder of debtor and of all underliers will be paid in full. The result would be full payment for the publicly held guaranteed underlier stock instead of being wiped out under the Trustees' Reorganization Plan.

Separate petitions for each underlier is impossible without Philadelphia Company's consent (see its answer to Trustee's petition page 5 supra).

If, similarly, statutory consolidation or statutory merger or any further conveyance or execution of any document were required from any of the underliers that, likewise, would be impossible without consent of the Philadelphia Company which obviously cannot be had.

No hearings have been held on the reorganization plan. It has not been submitted to security holders.

Question Presented.

Shall the demand of the facts control or must obeisance be made to the doctrine of the separate corporate entities of concerns which constitute one operation and one enterprise.

The Facts.

In 1902, the petitioner Philadelphia Company, brought about the unification of debtor and underliers (ff. 89, 95, 98, 100) (R. 639, 640) and welded them into one system in such fashion that a single route or a single passenger ride may involve the use of a number of the underlying companies' properties. Ascertainment of a proper apportionment of

the receipts of the system as a whole to the respective contributions of the underlying companies' properties is obviously almost an impossible task.

The unified transportation system functioned through a series of departments, all operated from one headquarters. The general departments which have been in existence for a great number of years, operate under the supervision of common general executives for debtor and all underliers (ff. 214) (R. 667). These general or joint departments include the Secretary's office, the Treasurer's office, the Accounting Department, the Adjustment Department, General Purchasing Agent, Director or Personnel and Advertising managers. The heads of these departments and certain of their employees are joint employees, in that they do not devote their time exclusively to the services of any one underlier or even one of Philadelphia Company's numerous enterprises (ff. 17, 214) (R. 667).

Four primary functions of the operating departments are on a system basis (ff. 221) (R. 669). Before the commencement of this reorganization, the Trustee Fitzgerald, formerly of the Philadelphia Company, was General Manager of this system. Under him were many departments and divisions, including those which have charge of routes, schedules and fares, operation of transportation, maintenance and renewals; accounting for revenues and expenses; all these functions have been performed on a system-wide basis in about the same manner since 1902 (ff. 221) (R. 669).

The Directors of Traffic Promotion in the Commercial Department has to do with the quantity and quality of services furnished, questions of routing and fare rates, extensions and alterations of service and such matters as the location of car stops and the erection of shelters. The heads

and staffs of the various divisions of the Commercial Department are not concerned with and do not know of the lines of demarcation between the underliers. In routing or scheduling or fixing fare zones, no weight is given to the original franchise locations of the underliers (ff. 222) (R. 669).

The group of men in charge of car house operations receive the schedules from the Traffic Promotion Division, assign men and cars to the routes on the schedule so prepared and send out the cars manned and ready for operation (ff. 229) (R. 669). Once these cars leave the barns, they are under the control of the superintendent of road operations (ff. 230) (R. 670).

The Chief Traffic Despatcher has charge of the entire operation of cars (ff. 237) (R. 671).

Maintenance and renewal of physical property of the System, consisting of overhead lines, cars, buildings, bridges and structures and under the charge of the Maintenance and Construction Departments which have 903 employees, exclusive of four supervisors, the General Superintendent and the head of three divisions (ff. 240) (R. 672).

There is just one shop in existence since 1902. It is at Homewood. It is here that the cars are inspected and repaired. The others were closed (ff. 242, 243, 244) (R. 672, 673).

> "The employees who maintain the property have no knowledge of the underlier groups and franchises, * * *" (244).
>
> "In general, in performing any of the functions of maintenance and operation of the system, the management pays no attention to the underlying companies, except in maintaining records of replacements, renewals and retirements" (ff. 248) (R. 674).

The Facts.

Fares are co-mingled. The Treasury Department * * * counts the amount of cash and tokens so received and reports such amounts by car houses to the auditors of receipts in the Accounting Departments, another such general department" (ff. 251). The Auditor of Receipts allocates to each route a portion of the cash and total fares collected at the car barn. "Thus, if one car house served ten routes and each route had collected 1/10 the total number of fares (regardless of what percentage was actually cash or in tokens), then each route would receive, on allocation, 10% of the total actual collections in the car house" (ff. 251) (R. 674).

"For general accounting purposes, however, all receipts from passenger revenues are lumped as one item * * *" (ff. 253) (R. 674).

"All expenditures are also accounted for on a system wide basis except certain capital expenditures for underliers * * *" (ff. 254) (R. 674).

"The method of accounting does not reflect separately the revenues or expenses of the underlying companies other than inclines. No accounting whatever is maintained of the receipts of the use or facility of any individual underlier than the inclines or of the expenses with respect to the sum of such facilities" (ff. 255) (R. 675).

SUMMARY OF ARGUMENT

I.

The realistic decision of the Circuit Court was plainly correct. The underliers' juridical conception was properly sacrificed for the reason that only thus can we overcome a perversion of the privilege to do business in the corporate form. Unity of life of debtor and of all underliers effected an equitable merger and an equitable consolidation in the common undertaking for a unified system of transportation. The Circuit Court has not departed from the accepted and usual course in holding that the District Court has jurisdiction of, and a Reorganization Plan may treat with, all underlier property, franchises and creditors (stockholders) thereof, without the filing or approving of separate reorganization petitions by or against underlier.

II.

There is no conflict of decisions on the point in issue.

III.

The questions presented by petitioner are not of sufficient importance to require review by this Court.

Argument.

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A Reorganization Court is the one in which an enterprise may be brought with a view of having its difficulties ironed out.

In order to expedite reorganization, the Bankruptcy Act's broad and general provisions suffice to confer upon the District Court power appropriate to adjust property rights in a debtor's estate to prevent a breaking up of an established enterprise.

One trolley ride covers many different franchise segments belonging to ten underliers. Other routes use the franchises of thirteen different underliers.

The petitioners' contention is as unreal as that of the drayman's team with each horse insisting he is separately incorporated and is working under a written operating agreement to pull the leased truck.

Petitioner Philadelphia is blowing hot and cold. If the juridical conception of its 36 underliers is to be preserved, each of these 36 underliers should have been an appellee below and a petitioner here. Their battle is being waged by Philadelphia in its name and not in theirs. Thus, Philadelphia and its underliers acquiesce in the disregard of the separate form of the 36 Philadelphia underliers.

Argument.

In their motions to dismiss the City's petition, the guaranteed underliers petitioners Monongahela (in which Philadelphia has stock interest) and Pittsburgh & Birmingham acknowledged inability to repossess property contributed to the common undertaking for a unified system of transportation, and state they rely on the outstanding guarantee of Philadelphia Company (p. 6 supra). They do no business except that connected with the receiving of money derived from their connection with the unified system of transportation and the paying out of it to security holders. In the Circuit Court the guaranteed underlier says:

> "The Debtor has been engaged in the business of operating street railway properties. Monongahela and Birmingham have not been engaged in that business since 1902" (Monongahela brief, p. 70).

With formal logic, they say, they do all the realistic acts which a careful lawyer would advise a corporation to maintain its appearance of corporate individuality. Therefore, they conclude, that the separate corporate form must be honored. A difficulty with that conclusion is that "at times unity is ascribed to parts which at least for many purposes retain an independent life, for only thus can we overcome a perversion of the privileges to do business in the corporate form." Cardozo, J., in *Berkey* v. *Third Ave. Ry. Co.*, 244 N. Y. 84 at 85; reargument at 244 N. Y. 602. *Anderson* v. *Abbott*, 312 U. S. 349 and *Centmont* v. *Marsch*, 1 Cir., 68 Fed. (2) 460 pierced the corporate veil after the separate form had been honored in a former controversy. In the Berkey case, Judge Cardozo pointed out that the New York Public Service Commission Law at Section 54 does not allow one carrier to use the franchise of another. The Pennsyl-

vania statute is otherwise. The authority contained in the Pennsylvania Traction Act upon which petitioner relies does not require recognition of the form and disregard of the facts. The Pennsylvania statute is not an insulator.

The evidence, at bar, is clear that, except for outstanding Philadelphia guarantee (1) there has been a welding, assimilation, merger of the properties of the debtor and of underliers in a single enterprise. (2) The day to day business of debtor and of each underlier was not kept separate. (3) No formal barriers were maintained between the debtor and each underlier. (4) Individuals functioned indiscriminately for debtor and for all underliers. (5) Debtor and all underliers were represented at and since 1902 functioned as a single business enterprise with unity of life. (6) Each of the underliers surrendered its rights under its franchise to operate independent lines of transportation. (7) Each corporation in the common undertaking became an agent or instrumentality of the other to the debtor's unified system of transportation.

The Master's fact findings establish:

(a) complete unity of life of debtor and underliers for forty-three years—almost half a century;

(b) that the identity of the underliers was obliterated in 1902, since which time there has been this unified system of transportation of debtor and of underliers;

(c) that when remitted to the tests of honesty and justice, it is inequitable to disregard the substance and to honor the separate form;

(d) that sacrifice of the separate underliers' form is essential to defend and uphold the public interest and public policy;

(e) that control over all underliers was so complete, interference so obstructive that by the general rules of agency, each corporation in the system was an agent of the other in furtherance of the common enterprise—the unified system of transportation.

In the light of these facts the Courts will not permit themselves to be blinded or deceived by mere form.

Anderson v. *Abbott,* 321 U. S. 349, 88 L. ed. 793;
Davis v. *Alexander,* 269 U. S. 114, 70 L. ed. 186;
Southern Pacific v. *Lowe,* 247 U. S. 330, 62 L. ed. 1142;
U. S. v. *Reading Co.,* 253 U. S. 26, 64 L. ed. 760;
Chicago, etc. v. *Minn. Civic,* 247 U. S. 490, 62 L. ed. 1229;
Chicago, etc. v. *Des Moines,* 254 U. S. 196, 65 L. ed. 219;
U. S. v. *Delaware L. & W. R. Co.,* 238 U. S. 516;
Linn & Lane v. *U. S.,* 236 U. S. 574; 59 L. ed. 725;
U. S. v. *Lehigh Valley,* 220 U. S. 257, 55 L. ed. 458;
Southern Pac. v. *I. C. C.,* 219 U. S. 498, 55 L. ed. 310;
McCaskill v. *U. S.,* 216 U. S. 504, 54 L. ed. 590;
Lehigh Valley Railroad v. *Delachesa,* 2 Cir. 145, Fed. 617;
Lehigh v. *duPont,* 2 Cir. 128 Fed. 840.

The benefits of separate corporate existence may be destroyed in the absence of any stock ownership, upon application of the rules of agency (*New York Trust Co.* v. *Carpenter,* 6 Cir. 250 Fed. 688, 673; *Berkey* v. *Third Avenue,* 244 N. Y. 84, 95). Monongahela and Pittsburgh and Birmingham stress the time of their incorporation (p. 19).

Argument.

Prior incorporation is not an insulator in a group of corporations engaged in a common undertaking. (*Weiser* v. *Mursam,* 2 Cir. 127 Fed. (2) 344; *Darling* v. *Young,* 8 Cir. 121 Fed. (2) 112.)

The debtor was merely a facility, tool, part, segment, agency and instrumentality of each underlier in the operation of this comprehensive system of transportation (Compare *Linn & Lane* v. *U. S.,* 236 U. S. 574), precisely as if the debtor has "built, owned and operated" the underliers and their property (compare *Northern Securities* v. *U. S.,* 193 U. S., 197, 326; 48 L. ed. 679, 696).

It is sheer sophistry to argue, that, because each underlier is a separate legal entity, it is an independent carrier in the conduct of its business free from the other underliers in this system (*Chicago, etc.* v. *Des Moines,* 254 U. S. 196; *Chicago, etc.* v. *Minn.,* 247 U. S. 490). *Southern Pacific* v. *I. C. C.,* 219 U.S. 498, 521). Where, as here, the debtor and the underliers carried on their common venture through the medium of these underliers, it makes little difference what such underliers may be called.

While most of the cases in which the Courts have pierced the corporate veil involve a parent—subsidiary relationship —the rule is no different where affiliates are involved.

> *Weiser* v. *Mursam,* 2 Cir. 127 Fed. (2d) 344;
> *Darling* v. *Young,* 8 Cir. 121 Fed. (2d) 112;
> *Luckenbach* v. *Grace,* 4 Cir. 267 Fed. 676.

The same theories of jurisprudence—(1) Law of Agency, (2) Principles of Equity, and (3) Doctrines of Public Policy—test the armor of every entity in a group of corporations, even when the challenge is made in equity receivership or in bankruptcy proceedings.

Trustees System v. *Payne,* 3 Cir., 65 Fed. (2) 103;
Stone v. *Eacho,* 4 Cir. 127 Fed. (2) 284;
Simon v. *Chambers,* 5 Cir. 86 Fed. (2) 569;
Commerce Trust v. *Woodbury,* 8 Cir. 77 Fed. (2) 478 cert. denied 296 U. S. 614; 80 L. ed. 435;
Nelson v. *Guaranty Trust,* 9 Cir. 60 Fed. (2) 463;
Central v. *Caldwell,* 8 Cir. 58 Fed. (2) 721;
In re Eiler's Music House, 9 Cir. 270 Fed. 915, cert. denied, 257 U. S. 646;
In re Riegers, Kapner & Altmark, 157 Fed. 609;
In re Muncie Pulp Co., 2 Cir. 139 Fed. 546 cert. denied, sub non *Great Western* v. *Oppenheimer,* 202 U. S. 621; 50 L. ed. 1175.

As it was with these Siamese twins when they were well, so it must be now that they are ill.

Disregarding that Bankruptcy Courts pierce the corporate veil to reach and administer property, petitioners argue that the local Pennsylvania law requires the federal court to honor form and to disregard substance. None of the cases cited by petitioners sustain so absurd a contention.

The cases in the guaranteed underliers' brief, pages 23-25, do not support their contention that all property rights, treatment of leases and conveyances, in bankruptcy proceedings are to be determined by application of state law. These cases do no more than apply the bankruptcy rule, that, unless the state law is satisfied, a lien is invalid against the challenge of a trustee, and an innocent third party. That does not arise at bar. By piercing the corporate veil of the indenture (contracting) parties and their privies, a merger is effected. (*Cock* v. *Bailey,* 146 Pa. 328: 23 Atl. 370 dealt with a union of obligor and obligees).

Circuit Judge Goodrich, who was a member of the Circuit Court majority in *Corn Exchange* v. *Klander,* 129 Fed. (2) 894, said at bar:

"The Pennsylvania statutes do not, nor could they forbid or limit the jurisdiction of the federal bankruptcy court."

The unity of life of corporations engaged in a common enterprise, as here, effects a merger of them, which is not defeated by a lease between them giving to the one the operation and control of the other. In *Southern Pacific* v. *Lowe,* 247 U. S. 330, the Court struck down the armor of separate existence of lessor and lessee and said:

"While the two companies were separate legal entities, yet in fact, and for all practical purposes, they were merged, the former being a part of the latter, acting merely as its agent, and subject in all things to its proper direction and control."

Allen v. *Philadelphia,* 3 Cir. 265 Fed. 817, stated "that leases for 900 years were, for operative purposes, to be treated as practical ownership equivalent to ownership by the operator". The preference for a lease instead of a statutory merger and consolidation might be termed psychological rather than procedural.

Seven states provide for an appraisal of the shares of dissenting stockholders of the lessor in precisely the same manner as that appraisal is provided for in statutory merger and consolidation.(b)

(b) Del. Rev. Code (1935) S 2178; Ind. Stat. Ann. (Burns 1935) S 55-2515; Md. Ann. Code (Flack 1935) Art. 23 S 221; N. H. Public Law (1942) Ch. 296 S 25; N. J. Rev. Stat. (1937) Title 48 Ch. 12 S 132; N. Y. R.R. Law S 161; Ohio General Code Ann. S 8810-8812.

In other states including Conn., Idaho, Illinois, Missouri, Montana and Virginia, there are provisions in the railroad statutes which might give a dissenter the right to an appraisal. In some instances where a railroad was organized under a special act, the act would provide for the dissenting shareholders, sometimes those of the lessee as well as those of the lessor. *Boston & M. R.R.* v. *Graham,* 179 Mass. 62; 60 N. E. 405 (1901).

Argument.

The essential idea in the leases and operating agreement for joinder of underliers with the debtor, like instruments in a merger and consolidation, is, that "lock, stock and barrel" went from all underliers to the debtor (*Mills* v. *Central R. R.*, 41 N. J. Equity 1). The Courts have held that a merger is effected by lease, in the absence of intercorporate stock ownership or control. (*The St. Paul M. M. Ry.* v. *Western Union*, 8 Cir. 118 Fed. 497; *Black* v. *St. Louis S. F. R. Co.*, 118 Mo. App. 198; 85 S. W. 96.) (None of the cases cited at pp. 21-26 of *Monongahela* brief are to the contrary.) Equity supplies the gaps between strict legal rules and the realism of modern business (*Helvering* v. *Metropolitan Edison*, 306 U. S. 522). An equitable merger and an equitable consolidation arises as a natural consequence of the maxim "equity looks upon that as done which ought to be done"(c). The parties to the leases understood that the underliers should go into a comatose condition.

A "court of equity may well look behind the corporate screen—" (*Westinghouse* v. *Allis Chalmers*, 176 Fed. 362, 367). "We are dealing here with realities not forms" (*Anderson* v. *Abbott*, 321 U. S. 349, 363; 88 L. ed. 793, 803). We are here interested in things not in looks. We must apply the motto: "*Esse quam videre*"; "to be rather than to seem."

Minnesota Mutual v. *McGirr*, 8 Cir. 263 Fed. 847, adjusted equities of parties to a transaction for which corporations should have been formed. The Court said (856):

> "The agreement between the parties is one that a court of equity would not and could not specifically enforce, but it is a case for equity to treat as having been done that which ought to have been done."

Monongahela and *Pittsburgh & Birmingham* say, page 18:

(c) *Emmons Coal* v. *Sir R. Ropner* (3 Cir.), 31 Fed. (2) 948 affirming 17 Fed. (2) 386, cert. denied 280 U. S. 577; 74 L. ed. 628 was an action for demurrage charges as a condition of releasing a cargo. The bond on which suit was brought was considered as given prior to release instead of after release.

> "The disregard of the corporate entities of Petitioners would not result in their properties being vested in the debtor; and the objective aimed at by the City, and, apparently by the Circuit Court, would not be attained."

As authority for this erroneous contention they cite *U. S.* v. *Milwaukee R. T. Co.*, 142 Fed. 247. That case does not so hold. In that case the United States applied to enjoin the payment of alleged rebates on freight, not to the shipping corporation, but to a transit company, as commissions for obtaining the business. Piercing the corporate veil, the Court held that the bill was not subject to demurrer in alleging that the Transit Company was controlled by the managing agent of the Shipping Corporation. The Court said, Sanborn, *J.* (p. 255):

> "If any rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

Judge Sanborn was a member of the unanimous court which in *Wabash Ry.* v. *American Refrigerator Transit* (C. C. A. 8) 7 Fed. (2) 335 said at pages 343-344:

> "There is no particular divinity surrounding the term 'corporation'. The courts will look through the form to get at the real intent of the association of individuals or corporations forming the organization, and, if rights of third parties have not intervened, will give effect to the real purpose of the organization in order to promote square dealing and effectuate justice."

Argument.

It is idle, for petitioners to say that disregard of the separate corporate form will not attain the objectives aimed at by the Circuit Court and by the City. Piercing the corporate veil effects a merger (see pp. 17-19 supra).

Quite apart from the fact that the Court did not test the armor of the juridical conception in *Second Ave. Co.* v. *United Traction Co.*—Appeal of *Pittsburgh Railways,* 328 Pa. 257; 195 Atl. 25 (*Monongahela Petition* p. 22) and that case was decided shortly before the present reorganization was begun, that case, as a precedent, is impaired by the fact that was a family controversy of Philadelphia subsidiaries and cannot be considered as a vigorously contested adversary litigation.

In *Monongahela Street Railway Co.* v. *Philadelphia Company and Consolidated Traction Co.,* 350 Pa. 603; 39 Atl. (2) 902 at page 912: "Monongahela—filed a bill of complaint against Philadelphia for specific performance of the covenant by Consolidated in the agreement of lease". "As to the guaranty of Philadelphia with respect to the covenant to pay taxes; Philadelphia being a compensated surety any doubt as to the meaning of the guaranties is to be resolved against it" (916). That Court was not required and did not attempt to determine the effect of the instrument between the underliers.

If the separate corporate form is to be honored, then this system must break up contrary to the public convenience contemplated by the Pennsylvania Public Utility Commission. In *Palmer* v. *Massachusetts,* 308 U. S. 79, this Court declined to permit destruction of a public convenience that had approval of the state regulatory body.

If we look to the spirit rather than to the letter, if we regard the substance rather than the form, if we fix the judi-

cial eye on essentials rather than incidentals, the debtor and the underliers are one, without need for any further instruments or proceedings.

As a result of this coalescence of this unity of life for about 50 years, it is as impossible to resurrect each underlier as it is to make again sand, stone, pebbles, cement and water out of concrete. Each lost its separate identity.

The petitioners' arguments that the underliers are still the owners of the leased property rests on the legal construction of the leases and operating agreements, and ignores the equitable consequence of the merger and the consolidation that has taken place.

The power of a Bankruptcy Court is not a rigid thing narrowly circumscribed by the Bankruptcy Statute (*Continental Ill. Nat. Bank & Trust Co.* v. *Chicago R. R.*, 294 U. S. 648).

The Bankruptcy Act should be liberally construed to accomplish the purpose for which it was enacted (*Wright* v. *Union Central*, 311 U. S. 273).

The facts call for treatment of debtor and underliers as one entity, with unity of life. The Circuit Court was plainly correct in concluding that, with the exception of Philadelphia Company's guarantee, all of the underliers property should be treated as if it were the property of the debtor without any further conveyance, or any statory merger or consolidation and that the public security holders of the underliers should be treated as creditors of the debtor.

"If the judicial power is helpless—then indeed it has become a handy implement of high finance" (*Anderson* v. *Abbott*, 321 U. S. 349 at p. 366.)

II.

There is no conflict of decisions on the point in issue.

III.

The questions presented by petitioner are not of sufficient importance to require review by this Court.

The extent, if any, to which Philadelphia shall benefit in a fair and feasable reorganization plan, and how Philadelphia shall clear up its guarantee is not of importance to burden this Court at this time.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari prayed for should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1946

In the Matter of PITTSBURGH RAILWAYS COMPANY, Debtor

NO. 360

PHILADELPHIA COMPANY, Petitioner

v.

CITY OF PITTSBURGH

NO. 363

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners

v.

CITY OF PITTSBURGH

BRIEF OF CITY OF PITTSBURGH IN OPPOSITION TO PETITIONS FOR CERTIORARI

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COUNTER-STATEMENT OF QUESTION INVOLVED

The street railway system in the Pittsburgh area has been operated by the Debtor as a physical and economic unit since 1902, in disregard of the corporate entities of 49 underlier corporations. The original properties of the Debtor and the underliers have been inextricably commingled and firmly welded into a single metropolitan street railway system, with the acquiescence of the underliers, and have been almost entirely renewed or replaced by the Debtor. No underlier or group of underliers is now able to operate separately, and in any event separate operation is contrary to the public interest. Most of the underliers are subsidiaries or affiliates of the Debtor; all of them are insolvent except a few non-affiliates which have been receiving rentals from the guarantor of their 900-year leases. The entire system has been in the custody of the reorganization court since May, 1938; unitary operation has been continued by Trustees of the Debtor.

The question involved is:

For the purpose of a system-wide reorganization, to which there is no practical alternative, does the court have jurisdiction over the properties of the underliers?

The Circuit Court below, reversing the District Court, held that the reorganization court does have such jurisdiction.

COUNTER-STATEMENT OF THE CASE

The statements of the case in the petitions for certiorari (Philadelphia Co. pet. pp. 5-16, Monongahela pet. pp. 2-7)[1] omit the extraordinary facts which moved the Circuit Court of Appeals below to conclude that "the facts of the present case call for the treatment of this great transportation system as one entity for purposes of reorganization, regardless of the elaborate jig-saw puzzle arrangement of all the underlying companies which have gone into it" (R. 951).

The facts are exceedingly complex and extensive,[2] and no attempt will be made to relate them in full. But as they are of controlling importance, the major facts will briefly be summarized.

The Debtor's Street Railway System

The great bulk of urban mass transportation in the

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[1] Refers respectively to separate petitions for certiorari filed at Nos. 359-361 by Philadelphia Company and at Nos. 362-364 by Monongahela Street Railway and other underlier companies, referred to herein as "Guaranteed Underliers".

[2] The record, of which only portions have been printed, consists of over 3,500 pages of testimony and 185 exhibits, in addition to the Amended Revised Plan (R. 541-603), hereinafter referred to as "the Plan", and the report of the Special Master (R. 604-838), hereinafter referred to by paragraph number as "SMR ¶ ——". Selected excerpts from the record appear in the City's appendix filed with the court below and included as a part of the Transcript of Record here, at R. 1a-540a.

Pittsburgh area is furnished by the Debtor's street railway system. Operations are conducted over approximately 500 miles of track, of which about 300 miles lie within the municipal limits of the City of Pittsburgh. The system serves the city and 85 surrounding municipalities, having an aggregate population of 1,173,000. In 1943, at the time of the hearings before the Special Master, 1,081 passenger cars were in use, operated over 82 routes. During the twelve months ending November 1, 1942 the system carried over 237,000,000 passengers and operations aggregated almost 35,000,000 miles of service. Gross revenues for 1942 totalled nearly $16,750,000. System operations are performed by about 3,000 employees.

All of the street railway companies in Pittsburgh and its environs were unified in 1902, since which date their franchises and properties have been operated by the Debtor as a unit. The method of unification, however, was by lease, operating agreement or stock purchase rather than by formal corporate merger (see table at R. 650-651); hence there are still alive 49 underlier corporations, whose only business since 1902 has been the receipt of rents and the distribution of dividends (cf. SMR ¶ 847, R. 798). Of these, 36 are controlled through stock ownership and interlocking officers and directors, by Philadelphia Company, parent of the Debtor and petitioner herein at No. 360; for convenience these 36 are designated "Philadelphia Underliers". Nine underliers are not affiliated with the Debtor or with Philadelphia Company and are in the fortunate position of having had their 900-year leases guaranteed by Philadelphia Company. These 9, designated "Guaranteed Underliers", have been receiving $500,000 per year in lease rentals from Philadelphia Company as guarantor and are

therefore, unlike all of the remaining underliers, not insolvent. They are the petitioners herein at No. 363. Like the 9 Guaranteed Underliers, the remaining 4 underliers, designated "Unguaranteed Underliers", are not affiliated with the Debtor or with Philadelphia Company, but they have no guaranty of their long-term leases. Significantly, although their former lines are at least as important to the system as are those of the Guaranteed Underliers, the Unguaranteed Underliers have joined in the City's petition (R. 99a-101a).

Unitary operations since 1902 have been in complete disregard of the existence of the underliers (SMR ¶ 248, R. 674). Combination routes which crossed earlier franchise limits were inaugurated; the fare was made uniform system-wide, with free transfer privileges; the entire power supply was changed; car houses, substations and repair shops were razed; connecting track was constructed and numerous sections of track abandoned; the loops followed in the congested downtown area were altered completely, in some cases to conform with one-way-street or other traffic requirements. In brief, for almost half a century the Debtor has dealt with the Underliers' properties as its own, disposing of some, discontinuing the use of others, adding still others, and integrating the parts into an operating whole. The cars, tracks, franchises, power stations, car houses, repair shops, electrical facilities and miscellaneous equipment of the 50 corporations have been thoroughly commingled, and what was once a group of independent regional lines has become a single transportation system serving a large community. All this was done without complaint from any underlier (cf. R. 92a-97a).

A bird's-eye view of the unexampled confusion of the system's assets is afforded by Exhibit 9, a large colored map showing the franchise locations of each underlier.[3] The map shows how the routes on which present operations are based,[4] by utilizing the franchises of numerous underliers, have utterly disregarded the underliers' corporate lines (R. 236a). With a few insignificant exceptions (SMR ¶¶ 713, 714, R. 771), each route, determined exclusively by the public convenience (R. 234a), uses the lines of 3 to 13 underliers (see Exhibit 39A, reproduced at R. 540a). Twenty of the routes operate over the lines originally franchised to 8 or more underliers. Five operate over 10 underlier franchises, 3 over 12, and one over 13. One route uses 30 segments of track franchised to 10 companies (SMR ¶ 723, R. 772).[5]

The underliers, ostensibly public service companies, thus do not have franchises to operable lines (cf. SMR ¶¶ 719, 720, 721, R. 772). They have also voluntarily submitted to being stripped of the facilities for furnishing street railway service. Of the nearly 1300 cars they owned when unified operations began in 1902, only 32 remain, none of

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[3] A copy of this key map will be supplied with this brief to each Justice.

[4] The terminus of each route is indicated on the map by the route number in a circle. The sub-map shows the loops followed by each route in the downtown area (the "Golden Triangle").

[5] This Court, in a previous case involving the Debtor, commented on the fact that the underliers' properties had been welded into one system "in such fashion that a single route or a single passenger ride may involve the use of a number of the underlying companies' properties." *Philadelphia Co. v. Dipple*, 312 U. S. 168, 174, 61 S. Ct. 538 (1941).

them used in passenger service (SMR ¶ 514, R. 629). All of the system's present 1000-odd street cars belong to the debtor (SMR ¶ 633, R. 654), for when new cars were acquired the Debtor never assigned any to individual underliers notwithstanding lease provisions for maintenance or ultimate replacement in kind (SMR ¶ 1006, R. 807-808), nor did the underliers demand that this be done (R. 187a, 524a-525a, 537a).[6] Power generating stations owned by the underliers were disposed of, and no underlier now has any generating station (SMR ¶ 512, R. 727). Since 1926 the system has had but one repair shop, the numerous shops of the underliers having been abandoned (SMR ¶ 243, R. 672). Twenty or more car houses which belonged to underliers have been razed or sold (R. 284a; SMR ¶ 513, R. 728). Miscellaneous equipment—horses, wagons, oil and grease, stationery, furniture, tools, supplies, repair parts and materials—have, of course, long since been used up or scrapped (cf. SMR ¶¶ 661, 834, 848, R. 657, 795, 798). Even the tracks, poles and wires in existence in 1902 have been worn out in use, abandoned, or otherwise disposed of, and none of such original physical property can be found today (R. 508a-512a).

No attempt was made to show that separate operation by any individual underlier, even if it were able to acquire the necessary property, is now possible. Philadelphia Company, however, introduced an elaborate case to establish the possibility of breaking the system up into three separate sub-"systems". The Special Master found that such sep-

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[6] Indeed, neither the Debtor nor any of the underliers has kept current records of the underliers' physical properties (R. 471a; SMR ¶¶ 836, 859, 873, 895, 898, R. 795, 800, 803, 804, 805).

arate operation, although theoretically possible, was not practicable (SMR ¶¶ 753, 774, R. 778, 781) and was not only contrary to the public interest but also detrimental to the private interests of many and perhaps all of the security holders of the underliers (SMR ¶ 775, R. 781).

Financial Description of the System

The confusion of the physical assets of the 50 corporations is more than matched by the complexity of the system's corporate and capital structures.

Most of the underliers are linked to the Debtor through a chain of leases and other contracts with one or more intermediate companies (see chart, R. 538a, and table, R. 650-651). The properties of one Guaranteed Underlier are incorporated into the system through no less than five instruments between intermediate transferees (SMR ¶ 71 (4), R. 636). Only 7 of the 49 underliers have leases to or operating agreements with the Debtor directly (SMR ¶ 161, R. 653).

Parent-subsidiary relations, too, are in the main indirect (see table, R. 650-651). Several Philadelphia Underliers are third-degree subsidiaries of the Debtor or an affiliate (Consolidated) and fourth-degree subsidiaries of Philadelphia Company. Most of them are either subsidiaries or affiliates of the Debtor in the second degree.

The system's financial structure, shown on Exhibit 8 (R. 539a), is even more incongruous. There are outstanding no less than 59 issues of bonds, many of them past due, some of them issued by corporations now defunct. There

are in addition 57 issues of common and preferred stocks; 1 issue of serial notes; and numerous demand notes.

The system's capitalization is fantastically high. The total face amount of all securities outstanding is almost $152,000,000 (Ex. 8, R. 529a), which contrasts glaringly with the total capitalization of $30,000,000 for the reorganized company as set forth in the Plan approved by the Pennsylvania Public Utility Commission.[7] The system's fixed charges total almost $3,500,000 (Ex. C of Plan, R. 589), exclusive of underlier taxes, and are thus over ten times the $300,000 of annual fixed charges provided for in the Plan (R. 562).

The system has been in financial distress almost continuously since its inception in 1902; except for a few years, it has been incapable of carrying its crushing burden of fixed charges (see SMR ¶ 391, R. 701). Two previous attempts to alleviate the system's financial troubles failed completely. The first was a private intercompany arrangement in 1913 (SMR ¶¶ 405-416, R. 704-706) and the second was an equity receivership which lasted from 1918 to 1924 (SMR ¶¶ 451-471, R. 712-719). Both were engineered by Philadelphia Company (SMR ¶¶ 406, 469, R. 704, 718) and neither resulted in any reduction of the system's intolerably excessive fixed charges.

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[7] *Re W. D. George, et al., Trustees of Pittsburgh Railways Company*, 42 P. U. R. (NS) 285 (1942). The plan of reorganization had been submitted to the Pa. P. U. C. under Sec. 178 of Chapter X, 11 U. S. C. Sec. 578.

Counter-Statement of the Case

Nature of the Proceeding

In recognition of the futility of limiting the reorganization to the properties of the Debtor alone[8] the original Plan and its two revisions proposed a system-wide reorganization. Separate reorganization proceedings for the underliers were contemplated, however, as the Trustees were led to believe that the underliers would coöperate to effectuate the Plan (R. 549). But four and one-half years after the reorganization began, when the Amended Revised Plan had been approved by the Pennsylvania Public Utility Commission and plan hearings were the next order of business, objections were raised, and the Trustees' efforts to secure the underliers' voluntary participation failed (R. 37a-38a). In order to break the deadlock which threatened to defeat the reorganization, the City of Pittsburgh filed the petition which forms the subject matter of the present proceeding.

The City's petition (R. 40a-83a) prayed that the court exercise jurisdiction over the underliers' properties in its custody and, as part of plan hearings, determine the rights and interests of all the underliers' security holders as persons having claims against or interests in the Debtor or its properties (R. 75a).[9]

Extensive hearings on the petition were held before a Special Master, at which the evidence presented by the City was designed to show that the separate corporate

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[8] See Report of Trustees, R. 26a-40a, at 34a-35a.

[9] The alternative prayers of the petition (R. 76a) were abandoned (SMR ¶ 12, R. 614).

entities of the Debtor and the underliers had been ignored throughout the history of the unified enterprise; that the traction assets, much of which were originally owned by the individual underliers, had been so inextricably commingled and so fully renewed or replaced by the Debtor in the practical day-to-day operations of the unified transit system that it was impossible to determine what presently existing properties, if any, were owned by the underliers; and that, as a result, the system was an integral unit and separate operation by any underlier was, as a practical matter, impossible.[10] The City argued for the recognition as a matter of law of what was true as a matter of fact—that in taking into its custody the Debtor's entire system the court was assuming jurisdiction over all the properties and assets, or interests therein, of each of the underliers. The City contended, therefore, that such jurisdiction should be exercised for the purpose of the plan.

The City's petition was supported by the Securities and Exchange Commission, the Reorganization Trustee, the Unguaranteed Underliers, the Committee for Municipal Interests (representing numerous municipalities), the County of Allegheny, public security holders, banks having large holdings in underlier securities, an indenture trustee, the Tort Creditors Committee, and the Six Month Creditors (R. 205a-216a; SMR ¶¶ VII, XI, R. 611, 612).

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[10] Evidence was also introduced showing that Philadelphia Company, by means of its stock holdings and a virtually complete identity of officers and directors, dominated and controlled the Debtor and the 36 Philadelphia Underliers in the formation and expansion of the transit system and in the constituent companies' activities and accounting methods, treating the Philadelphia Underliers, with their full acquiescence, simply as divisions of the Debtor.

Opposition to the City's petition has come only from Philadelphia Company and the Guaranteed Underliers (petitioners herein, the former at No. 360, the latter at No. 363), and stems from a private controversy between them over lease guaranties. Philadelphia Company is attempting to extricate itself from its improvident undertaking as guarantor (SMR ¶ 491, R. 726). The Guaranteed Underliers quite naturally wish to preserve their "beautiful guarantee" (SMR ¶ 864, R. 802; see opinion of Circuit Court, R. 944).

The District Court adopted the recommendation of the Special Master that the City's petition be dismissed (R. 148a). The Circuit Court of Appeals reversed (R. 939-952), and the instant petitions for certiorari followed.

ARGUMENT

Certiorari should be denied because this Court does not grant certiorari to review evidence and discuss specific facts,[1] or to give the party defeated in the Court below another hearing in matters peculiar to a single controversy.[2]

This important case has turned upon the facts rather than upon the law, for the facts reveal a unique situation calling for the exercise of the Court's broad reorganization powers—powers which it clearly possesses but which it may rarely if ever again be called upon to exercise. The Circuit Court of Appeals below decided that the long-suffering people of Pittsburgh are entitled, without further delay, to a thoroughgoing reorganization of their mass transit system, and that the reorganization court has the power to effect it. Its decision is clearly right *under the facts of this case*. It is not in conflict with any other decision of its own or of any other Circuit Court, nor did it decide a question of Federal law which should be settled by this Court or in a way probably in conflict with the applicable decisions of this Court.[3]

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[1] Robertson and Kirkham, *Jurisdiction of the Supreme Court of the U. S.* (1936), sec. 303, citing *U. S. v. Johnson*, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925); *So. Power Co. v. N. C. Public Service Co.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413 (1924); *Crowell v. Benson*, 285 U. S. 22, 65, 52 S. Ct. 285, 76 L. Ed. 598 (1932).

[2] Ibid., citing *Magnum Import Co. v. Coty*, 262 U. S. 159, 163, 43 St. Ct. 531, 67 L. Ed. 922 (1923).

[3] Rule 38, ¶ 5 (b) of the Rules of this Court.

I.

THE DECISION OF THE CIRCUIT COURT BELOW RESTS UPON THE PECULIAR FACTS OF THE CASE

A system-wide reorganization must be accomplished in this proceeding because the compulsion of the extraordinary facts of the case makes any other solution unworthy of serious consideration (cf. R. 34a-35a). First, there are fifty corporations intertwined in a single enterprise. Secondly, the physical integration of the properties of the underlying corporations with each other's and with those of the Debtor (described *supra,* pp. 4-7) is unparalleled in the recorded cases. Moreover, each company's property is valueless to its stockholders and creditors except as an integral part of the Debtor's street railway system. Lastly, necessary public transportation service in one of the country's largest industrial centers can be continued only by a reorganization of the system as a unit. The petitioners have been unable to point to a single case on the question of reorganization jurisdiction which is even remotely analogous on the facts, and it is highly unlikely that another like it will ever arise.

It is apparent throughout the opinion of the Circuit Court of Appeals below that its decision upholding jurisdiction over the properties of the underliers was based upon the unprecedented combination of circumstances presented.

The court summed up as follows (R. 951-952):

> "Our conclusion is that the facts of the present case call for the treatment of this great transportation system as one entity for purposes of reorganization,

> • • • We think that the many years of factual unity and the public necessity for the measures which will insure the proper economic foundation for the system, override the arguments for the recognition of the legal concepts of separate entity on the part of the underliers."

There is certainly no need for this Court to reexamine the Circuit's Court's correct decision of this unique problem.

II.

THE EXERCISE OF JURISDICTION OVER THE UNDERLIERS' PROPERTIES IS CONSISTENT WITH PRIOR LAW

In the words of the Circuit Court of Appeals below, "the issue is whether the demands of the facts is to control or whether obeisance must be made to the doctrine of the separate corporate entity of all these concerns, which from the business point of view constitute one operation and one enterprise" (R. 947). The Circuit Court refused, in the circumstances of this case, to "make obeisance". Its decision, the City submits, does not overstep the statutory powers which the Congress granted to courts of reorganization, and is consistent with earlier decisions in the development of the law of bankruptcy reorganization.

A. Jurisdiction over the Properties of the Philadelphia Underliers and of the Unguaranteed Underliers Follows Established Precedent

As to the 36 Philadelphia Underliers, the Circuit Court found it unnecessary "to discuss those companies which have not followed ritual so closely in preserving their own separate character" (R. 952). However, the record contains overwhelming evidence showing that all of these underliers have been so fully and completely controlled by Philadelphia Company—through stock ownership (SMR ¶ 25, R. 617), interlocking officers and directors (SMR ¶¶ 389, 390, R. 700), interrelated books and accounts (SMR ¶¶ 218, 344, R. 668, 690), and dictation of corporate and financial actions (see SMR ¶ 1010, R. 809; also, SMR ¶¶ 93, 119-121, 157, 437-439, 487, 489, R. 639, 642, 648, 710, 724, 725)—that these underliers were simply divisions or departments of the Debtor in the street railway holdings of Philadelphia Company. Upon the conventional grounds for the disregard of separate corporate entities, the joint administration of the assets of the 36 Philadelphia Underliers with those of the Debtor in one proceeding is supported by ample judicial precedent. *Commerce Trust Co. v. Woodbury*, 77 F. 2d 478 (CCA 8, 1935); *Trustees System Co. of Pa. v. Payne*, 65 F. 2d 103 (CCA 3, 1933); *Stone v. Eacho*, 127 F. 2d 284 (CCA 4, 1942), cert. den. 317 U. S. 635, 63 S. Ct. 54; *Central Republic Bank & Trust Co. v. Caldwell*, 58 F. 2d 721 (CCA 8, 1932).

The Circuit Court also (R. 952) found it unnecessary to discuss the voluntary joinder of the 4 Unguaranteed Underliers (R. 206a-209a) which, standing alone, brings their properties within the court's jurisdiction. *Re Metropolitan Railway Receivership*, 208 U. S. 90, 111, 112, 28 S.

Ct. 219 (1909); cf. *Cline v. Kaplan*, 323 U. S. 97, 65 S. Ct. 155 (1944); *MacDonald v. Plymouth County Trust Co.*, 286 U. S. 263, 52 S. Ct. 505 (1932); 2 Collier on Bankruptcy (14th ed.), Sec. 23.08.

There remain the 9 Guaranteed Underliers, to which the Circuit Court below devoted its entire opinion.

B. Jurisdiction over the Properties of the Guaranteed Underliers Is Consonant with Reorganization Law

The Guaranteed Underliers do not possess franchises to operable lines (SMR ¶ 720, R. 772); they haven't the facilities or equipment necessary for street railway service (SMR ¶¶ 834, 836, 848, 859, R. 657, 795, 800); they have no intention to resume public service (SMR ¶¶ 842, 863, 864, 876, R. 797, 801, 802, 803); they could not successfully operate separately even if they tried (SMR ¶ 880, R. 803); they believe a continuation of unitary operation of the whole system is desirable and have no alternative solution to offer (R. 395a-396a). Nevertheless, they point to the fact that they are not affiliated with the Debtor or with Philadelphia Company, and argue that their former lines are not "property of the debtor" and are therefore beyond the federal bankruptcy court's reorganization jurisdiction because under the law of Pennsylvania the 900-year leases under which they ceased operations in 1902 are merely "valid demises of possessory rights" to properties of which they retain the ownership as landlords (Monong. pet., p. 21; see also Phila. Co. pet., pp. 19-20).

Any discussion of the court's power to include the properties of the Guaranteed Underliers in a system-wide reorganization must have reference to the nature of this proceeding and the character of the relief sought. The objective of the City's petition is relatively limited. It does not seek a turn-over order, for all of the system's properties have been in the custody of the court since May 10, 1938. It does not seek to make the assets of one underlier subject to the claims of the creditors of another or of the Debtor; nor does it seek to subordinate the claims of any system creditor or security holder to those of any other.[4] Its only purpose is to make possible a system-wide plan hearing which will bind everyone. The City is not now trying to determine *how* the system shall be reorganized but only that it *shall* be reorganized. The City's petition does not deal with substantive property rights but with matters of jurisdiction. It does not attempt to fix the quantum of each party's interest in the system's properties; the petition asks only for a finding that all parties—including the underliers and their stockholders and creditors—have *an* interest in *all* of the properties rather than the right to repossess any particular portion of such system properties.

A system-wide reorganization in this case, under the control of the court, need not and should not work preferences among the parties having interests in the Debtor and the underliers. Nor need it relegate the underliers' security-holders to the status of creditors of the Debtor or even to

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[4] The City's prayer pointedly requests the court, in exercising jurisdiction over the system properties, to respect the relative rights and equities of the stockholders and creditors of the several underliers (R. 75a).

the status of unsecured creditors of the entire enterprise. The problem of determining an equitable distribution of the Reorganized Company's securities among the stockholders and creditors of the several underliers is complex but could readily be solved.[5] The reorganization may well follow the general theory pursued in the Plan, under which distribution to the underliers' security-holders would be on the basis of the value of each underlier's assets as determined by a reasonable formula.[6] In any event, the segments of the system which, it is argued, are owned severally by the Debtor and the 49 underliers, cannot possibly exceed the value of the entire system; the underliers' opposition to jurisdiction rests therefore, not upon the possible loss of their property, but upon distrust of the court's equitable determination of its value.[1]

The District Court below is a federal reorganization court of broad and far-reaching powers. By statute they include those of a court of equity of receivership as well as

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[5] Cf. R. 961 where the Reorganization Trustee states:

> "If this court holds that title to the properties of the underlying corporation is vested in the Trustees of Pittsburgh Railways Company, Debtor, subject, however, to the claims of the creditors and the interests of the stockholders of the respective underlying corporations, there would appear to be no difficulty involved in providing adequate means for execution of a plan."

[6] See Plan, p. 33 (R. 574).

[1] Of course the *real* reason for the opposition of Philadelphia Co. and of the Guaranteed Underliers is their private battle, to terminate, or to preserve, the lease guaranties (cf. SMR ¶¶ 491, 864, R. 726, 802).

those of a bankruptcy court.[2] Further powers are conferred by the reorganization provisions of the Bankruptcy Act.[3] And, lastly, it is a court of equity, which is empowered to look behind legalistic forms and to deal equitably and realistically with the problems before it.[4]

Even before the enactment of the reorganization statutes the courts never hesitated to assert jurisdiction where the facts warranted it, and ignored the fiction of separate corporate entities in doing so. In equity receivership as well as in bankruptcy the courts have ordered consolidated proceedings for related corporations in order to prevent fraud, protect creditors and subserve the public interest. *In re Eilers Music House*, 270 F. 915 (CCA 9, 1921), cert. den. 257 U. S. 646, 42 S. Ct. 55; *Central Republic Bank and Trust Company v. Caldwell*, 58 F. 2d 721 (CCA 8, 1932); *Stone v. Eacho*, 127 F. 2d 284 (CCA 4, 1942), cert. den. 317 U. S. 635, 63 S. Ct. 54; *In re Rieger, Kapner & Altmark*, 157 F. 609 (D. C. Ohio, 1907); *Commerce Trust Co. v. Woodbury*, 77 F. 2d 478 (CCA 8, 1935), cert. den. 296 U. S. 614, 56 S. Ct.

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[2] Secs. 114, 115 of Chapter X, 11 U. S. C. Secs. 514, 515. Sec. 102 of Chapter X, 11 U. S. C. Sec. 502, makes applicable to reorganizations almost all of the provisions of Chapters I to VII of the Bankruptcy Act, of which Secs. 2 (6), 2 (7) and 2 (15), 11 U. S. C. Secs. 11 (6), 11 (7) and 11 (15) are particularly relevant.

[3] See, e. g., Secs. 203, 212 and 227, 11 U. S. C. Secs. 603, 612 and 627. In addition, Sec. 262 of the Judicial Code (28 U. S. C. Sec. 377), authorizes Federal courts "to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdiction, and agreeable to the usages and principles of law."

[4] *Local Loan Co. v. Hunt*, 292 U. S. 234, 54 S. Ct. 695 (1934).

134. The fact that the Guaranteed Underliers, by virtue of continued receipt of lease rentals from Philadelphia Company as guarantor, are not insolvent, is not of itself significant. *Trustees System Co. of Pa. v. Payne,* 65 F. 2d 103 (CCA 3, 1933).

The foregoing cases exemplify the broad powers of the ordinary bankruptcy or equity receivership court. When acting as a reorganization court, its *in rem* jurisdiction is extended to the point where it is practically unlimited. Finletter on Bankruptcy Reorganization (1939) comments as follows (at pp. 142 et seq.):

> "In one important class of cases, where the property interests in an asset are divided, the reorganization court * * * may * * * be said to have complete jurisdiction over the res. This jurisdiction consists not merely of the general right to hear and decide all claims with respect to it, such as arise from the mere possession of property by a court, but is a full one to administer the asset and all rights in it for the purpose of including it in a plan or arrangement. The only limitation of this power is that it must be used 'for the purposes of this chapter'—that is, with the end of an eventual reorganization in view."

In the present case the *res* is the unitary street railway system, which includes the properties of the underliers, and the only purpose of the court's jurisdiction is to effect a reorganization of the enterprise.

In the leading case of *Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 55 S. Ct. 595 (1935), this Court expounded the purpose and

effect of reorganization statutes. In upholding the power to control assets of the debtor in the hands of a pledgee, the Court said (292 U. S. at 676, 677):

> "* * * It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained. As to that it is not necessary to express an opinion. But a proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile."

It is noteworthy that in that case the court was simply protecting the possibility of a plan. In the present case, the proceedings have advanced to the stage where a carefully prepared system-wide plan has received the approval of the Pennsylvania Public Utility Commission and awaits consideration by the Court and the parties at plan hearings. There is, therefore, far more reason for denying to recalcitrant parties the right to obstruct the reorganization.

A further application of the extended jurisdiction of courts of reorganization is furnished by *In re Prudence-Bonds Corp.*, 77 F. 2d 328 (CCA 2, 1935), cert. den. 296 U. S. 584, 56 S. Ct. 95, where the court restrained indenture trustees from foreclosing, selling or encumbering certain mortgages pledged with them by the debtor. The court explained (p. 330):

> "* * * For the purpose of reorganization, the court should take complete charge of property in order that it may from the beginning, and through all the intermediate steps of reorganization, so administer the property as to achieve the desired rehabilitation."

That property held under long-term lease may, where circumstances warrant, be treated as property of the lessee for purposes of bankruptcy reorganization, was recognized in the case of *In re Hotel Gibson Co.*, 11 F. Supp. 30 (D. C. S. D. Ohio, 1935).

Realistically, the underliers' reversion is a security lien, like that of a mortgagee, rather than a paramount title.[5] The underliers rely on a remote and speculative reversion, to occur nearly a millenium hence,[6] for their contention that they now own public utility properties which for two generations have been integral portions of the Debtor's transportation system. The Circuit Court held properly that

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[5] The reorganization court's power to disturb, and if necessary divest, the lien held by a mortgagee or other secured creditor is specifically granted by Sec. 227 of Chapter X, 11 USCA Sec. 627. See also Secs. 216 (1), 216 (10), 216 (14) and 226 of Chapter X, 11 USCA Secs. 616 (1), 616 (10), 616 (14) and 626.

[6] Cf. opinion of Circuit Court below (R. 951):

> "We are concerned with the realities of the situation, not the least of which is the projection of a trolley transportation system almost a thousand years into a future of revolutionary travel changes in order to substantiate the existence and worth of reversionary fee simple."

As shown below (see quotation *infra*, p. 28), the Pennsylvania Public Utility Commission has forecast a limited remaining life for street railways as a means of urban mass transportation.

these integral portions of the Debtor's system are, under the facts of the case, property of the Debtor for reorganization purposes.

It is true, of course, that in other situations long-term railroad and street railway leases have been given effect as such.[6a] An examination of those decisions reveals, however, that in each case the facts were vastly different from those presented here. In each case there was no doubt that the leased line was separably operable; in several cases the lessor had already repossessed and resumed separate operation of its line. Here, as has been shown, each underlier owns but an inoperable segment of a unified system.

Upon the question of reorganization jurisdiction, *Price v. Gurney*, 324 U. S. 100, 65 S. Ct. 513 (1945), relied upon by the Guaranteed Underliers (Monong. pet., p. 34), is entirely inapplicable to the present case. *Price v. Gurney* involved an effort by stockholders to file a petition for the reorganization of their corporation. They professed to be acting on behalf of the corporation, as in a derivative suit. This Court held that Chapter X did not empower stockholders, who under local law did not have authority to speak for the corporation, to file a petition on its behalf so as to enable the court to acquire original jurisdiction.

[6a] Philadelphia Co. (pet. p. 22) cites: *Palmer v. Connecticut Railway and Lighting Co.*, 311 U. S. 544, 61 S. Ct. 379 (1941); *Thompson v. Texas Mexican Ry. Co.*, 324 U. S. 838, 66 S. Ct. 937 (1946); *Smith v. Hoboken R. R. Warehouse & S. C. Conn. Co.*, U. S. , 66 S. Ct. 947 (1946); *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 F. 721 (CCA 2, 1912); *American Brake Shoe & Foundry Co. v. New York Railways Co.*, 293 F. 633 (CCA 2, 1923); *In re Chicago Rapid Transit Co.*, 129 F. 2d 1 (CCA 7, 1942).

The question here is not the same. It is rather whether the reorganization court's jurisdiction, which admittedly extends to the Debtor and its property, comprehends all the system's street railway assets, including those claimed by the underliers.

As shown above, the City's petition raises only the issue of bankruptcy jurisdiction and does not affect the parties' substantive property rights; hence the Pennsylvania decisions cited by the petitioners (Monong. pet. pp. 21-22; Phila. Co. pet. pp. 29-20) are irrelevant.[7] The Circuit Court below ruled properly that in determining whether "the sweep of a federal statute" (the Bankruptcy Act) encompasses jurisdiction over underlier properties in the circumstances of this case, the state law is not controlling (R. 948).

The basic question of whether the federal court has jurisdiction under a federal statute is one of federal law. For the purpose of determining such federal jurisdiction, the law of the federal courts controls, and not the law developed under different circumstances and for different purposes by state courts. The purposes of Chapter X, as applied to a large and important utility desperately in need of reorganization, would be frustrated by a federal sub-

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[7] The relative rights and priorities of the stockholders and creditors of the several underliers may be determined by Pennsylvania law. But this is a matter for later consideration, at plan hearings, and does not bear upon the question of bankruptcy jurisdiction. Even under the local law of Pennsylvania, however, it has been held that where, as here, the original properties of lessor street railway companies have been replaced by the lessee operating company, the existing properties belong to the lessee. *In re Philadelphia Rapid Transit Co.*, 16 F. Supp. 941 (D. C. E. D. Pa. 1936).

servience on issues of jurisdiction to title decisions enunciated by state courts.

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) (cited in Monong. pet. p. 24) does not apply here. This Court has clearly indicated that the rule of *Erie R. Co. v. Tompkins* is limited to diversity cases, in order that the rights of parties to ordinary controversies shall not be affected simply because a federal instead of a state forum is resorted to. *Guaranty Trust Co. v. York*, 326 U. S. 99, 108, 65 S. Ct. 1464, 1469 (1945). The *Tompkins* rule is not applicable to cases involving the interpretation of federal statutes. *Commissioner of Int. Rev. v. Tower*, U. S. , 66 S. Ct. 532, 536, 90 L. Ed. 599 (1946); *Holmberg v. Armbrecht*, U. S. , 66 S. Ct. 582, 583-584, 90 L. Ed. 590 (1946). Specifically, it is not applicable in the interpretation of the federal Bankruptcy Act. *Heiser v. Woodruff*, U. S. , 66 S. Ct. 853, 855-856, 90 L. Ed. 828 (1946); *American Surety Co. of N. Y. v. Sampsell*, U. S. , 66 S. Ct. 571, 90 L. Ed. 550 (1946). In the latter case this Court held that even though the federal law governing the distribution of the bankrupt's estate should be applied with appropriate regard for rights acquired under rules of state law, "the extent to which state law is to be so considered is in the last analysis a matter of federal law."[8]

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[8] The bankruptcy cases cited by the Guaranteed Underliers (Monong. pet. pp. 23-25) are not inconsistent with this statement.

Holt v. Crucible Steel Co., 224 U. S. 262 (1912) was decided simply by the application of old Section 67 (a) [since amended: 11 U. S. C. Sec. 105 (a)], which then read: "Claims which for want of record or for other reasons would not have been valid liens as

C. The Public Need for Preserving Pittsburgh's Transportation System Justifies Exercise of the Court's Maximum Powers

The Court's power to effect a thoroughgoing and lasting reorganization of Pittsburgh's mass transit system rests, in large measure, upon the paramount public need for the relief sought.

The framers of the reorganization statutes could not anticipate every possible fact situation, such as that presented by the unique record of the present case, but there is no doubt that they intended to empower the courts to meet every contingency of complex modern conditions in order to come to the aid of all enterprises worthy of re-

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against the claims of the creditors of the bankrupt shall not be liens against his estate." *Finn v.* 415 *Fifth Avenue Co.*, 153 F. 2d 501 (CCA 2, 1946), cert. den. 66 S. Ct. 1014, which held that a reorganization trustee is subject to the New York Rent Control Law, turned upon earlier decisions of this Court which made property administered by a bankruptcy trustee subject to general municipal regulation (see p. 503 of 153 F. 2d).

Benedict v. Ratner, 268 U. S. 353 (1925) and *Corn Exchange National Bank & Trust Co. v. Klauder*, 318 U. S. 434 (1943) held that whether a transfer of the bankrupt's property was in fraud of creditors, under Sec. 60 (a) of the Bankruptcy Act, 11 U. S. C. Sec. 96 (a), should be governed by the local law. In the *Klauder* case, where a harsh decision resulted, this Court pointed out (at pp. 438-439 of 318 U. S.) that the Congress, in enacting Sec. 60 (a), had intended to strike down secret assignments. These decisions are consistent with those limiting the effect of the *Erie R. Co. v. Tompkins* rule to diversity cases; in both instances this Court has felt that in determining the effect of commercial dealings, the parties' rights should not be affected by the accident of a federal instead of a state forum.

habilitation. As stated by the court in *Campbell v. Alleghany Corp.*, 75 F. 2d 947 (CCA 4, 1935), cert. den. 296 U. S. 581, 56 S. Ct. 92:

> "The statute is of a remedial character, designated to facilitate the reorganization of corporate business * * * Its purpose should be forwarded by a fair and liberal construction of its provisions, not thwarted by any narrow or technical interpretation, and certainly not by reading into its language conditions and limitations which the lawmakers themselves did not see fit to express." (75 F. 2d 947 at 950)

Under the facts of this unusual case, there is universal agreement upon the need for reorganizing the system as a unit, to the end that a single owning and operating company, conservatively capitalized, may emerge. Any other solution is contrary to public policy, destructive of property values, merely temporary and palliative, and therefore not a feasible alternative to a system-wide reorganization (cf. R. 193a-205a).

The District Court below said (R. 134a):

> "The preservation of this transportation unit appears to be a public necessity in order that adequate transportation at reasonable rates be furnished the public in the City of Pittsburgh and in surrounding areas. The system should be reorganized as a unit if it can be legally done."

The Circuit Court of Appeals below stated (R. 943):

> "There is undoubted need on the part of Pittsburgh and the surrounding country for a unified trans-

portation system. There is a necessity that that transportation system be put on a sound economic basis if it is to continue to do its public work."

The Pennsylvania Public Utility Commission, to which the system-wide plans of reorganization were submitted for approval "as to the public interest therein and the fairness thereof",[9] stated categorically:

> "*The riding public in Pittsburgh and its immediate environs is entitled to a mass transportation system which will give adequate service at reasonable rates.* To this end studies should be made looking to the elimination of duplicate facilities. * * *
>
> "Our experience over a number of years has convinced us that the street car is disappearing as a medium of mass transportation except in the congested parts of a few of our larger cities. We have seen city after city abandon street-car service, in whole or in large part, in favor of either bus service or trackless trolley service. * * *"[10]
>
> "* * * We may add that far from being of the opinion that the reorganized company should confine itself to street railway service, leaving bus service to be performed by several or a number of independent operators, *we think that the public interest would best be served by the reorganized company's conducting all mass transportation service, both street railway and*

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[9] Sec. 178 of Chap. X, 11 U. S. C. sec. 578.

[10] *Re W. D. George, et al., Trustees of Pittsburgh Railways Co.*, 38 P. U. R. (NS) 434, 439, 440 (1940).

bus in the Pittsburgh urban district.'' [1] **(Emphasis supplied)**

The courts have been especially solicitous of the public interest in construing Acts of Congress designed to promote business rehabilitation, industrial peace and the national welfare. Thus, consideration of the public interest has influenced decisions of this Court in interpreting and

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[1] *Re W. D. George, et al., Trustees of Pittsburgh Railways Co.*, 41 P. U. R. (NS) 193, 196 (1941).

The petitioners make a point of the fact that the long-term leases executed by the underliers, and the operation of their lines with others as a general system, were authorized by Pennsylvania statutes (Monong. pet. p. 21; Phila. Co. pet. p. 26). The Guaranteed Underliers then argue (Monong. pet. pp. 25-26) that insofar as the public interest is concerned, the powers of the Commonwealth of Pennsylvania to regulate local transportation, and to control intercorporate relations between companies engaged therein, have been expressed in such statutes and cannot be interfered with by the federal bankruptcy court, citing *Palmer v. Commonwealth of Massachusetts*, 308 U. S. 79, 84 (1939).

What this argument overlooks is the fact that the Pennsylvania statutes and the leases they authorize are themselves subject to the state's sovereign police powers exercisable in the public interest, and that with reference to public utility matters, such paramount police powers have been delegated to the Pennsylvania Public Utility Commission. *City of Scranton v. Public Service Commission*, 268 Pa. 192, 196, 110 A. 761 (1920); Pennsylvania Public Utility Law of 1937, P. L. 1053, Sec. 202, 66 Purdon's Pa. Statutes, Sec. 1122.

We need not speculate what the reaction of the Pennsylvania Public Utility Commission would be to the underliers' contentions in the present case—contentions by companies unable to resume public service that their 900-year leases must be observed to the letter in every particular even if to do so will destroy Pittsburgh's transportation system.

enforcing the Packers and Stockyards Act of 1921, the Railway Labor Act of 1926, and the Emergency Price Control Act of 1942. *U. S. v. Morgan*, 307 U. S. 183, 59 S. Ct. 795 (1938); *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, 57 S. Ct. 492 (1937); and *Hecht Co. v. Bowles*, 321 U. S. 321, 64 S. Ct. 587 (1944), respectively.

In the *Morgan* case, *supra*, the Court said: "It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved" (307 U. S. 183 at 194). In the *Virginian Railway* case, *supra*, the Court explained (at p. 552 of 300 U. S.):

> "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved [citing cases]."

And in the *Hecht Co.* case, *supra*, the Court said that "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for * * * relief in these cases" (at p. 331 of 321 U. S.).

The public interest is here doubly important, for the present case involves not only the interpretation of a Federal statute designed to enable the financial reorganization of corporations, but also its application to a large public service company whose rehabilitation is vitally necessary to the welfare of a metropolitan community.

III.

THE DECISION OF THE COURT BELOW IS COMPATIBLE WITH THE EARLIER DECISION IN PHILADELPHIA COMPANY V. DIPPLE

A controversy involving the Debtor and the underliers came to the attention of this Court and of the Circuit Court below earlier in the present reorganization proceedings: *Philadelphia Co. v. Dipple*, 312 U. S. 168, 61 S. Ct. 538 (1941), affirming 111 F. 2d 932 (CCA 3, 1940).

In that case, this Court and the Circuit Court observed the separate corporate entities of the underliers, whereas in the present case the Circuit Court has disregarded their separate entities. Both decisions, the City submits, are correct and are quite compatible with each other. The *Dipple* case, in the words of the Circuit Court (R. 947) "was concerned with the relations of the various companies in this system with each other". Philadelphia Company, seeking special treatment for the underliers and for itself,[2] sought to have the Trustees of the Debtor pay the underliers' corporate taxes as administration expenses. Since it was uncertain whether the sum due each underlier for the use and occupation of its properties was in excess of that underlier's taxes, both this Court and the Circuit Court denied the relief requested because an illegal preference might result. This Court said:

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[2] As guarantor of the tax obligations of the Guaranteed Underliers: *Monongahela St. Ry. Co. v. Philadelphia Co.*, 350 Pa. 603, 39 A. 2d 909 (1944).

"The underlying companies' relation to the Pittsburgh Railways Company is that of creditor and debtor and no principle of equity justifies ignoring that relation when so to do might adversely affect the claims of other creditors" (at p. 176 of 312 U. S.).

The decision in the *Dipple* case would be the same whether or not jurisdiction over the underliers' properties, as now prayed for by the City, be upheld. For there is no way of telling whether the individual corporate tax obligations of each underlier exceed the value of that underlier's (or of that underlier's stockholders' and creditors') interest in the system. Obviously, no underlier (or its stockholders or creditors) can demand more of the Trustees of the Debtor than its interest in the System is worth. And in any event, when and if any underlier's taxes are paid by the Trustees of the Debtor, the amount so paid will be on account of allowances for use and occupation or in reduction of the value of the underlier's interest in the System, and not as an administration expense.

Moreover, the equities in the *Dipple* case were entirely different from those presented now. In the *Dipple* case, Philadelphia Company, which for its own purposes had nurtured and preserved the separate corporate entities of the underliers, was asking that their entities be disregarded for the purpose of granting a possible preference;[3]

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[3] Indeed, Philadelphia Company was attempting to benefit from a disregard of the separate corporate entities of the underliers while insisting, at the same time, that their separate entities be observed. See change in this Court's opinion, noted at p. 656 of 312 U. S., which was prompted by a letter addressed to Mr. Justice Roberts by counsel for Philadelphia Company (SMR ¶ 802, R. 789).

here, on the other hand, the separate corporate entities of the underliers are being disregarded so that the System's thousands of creditors may receive prompt and equitable relief and, of paramount importance, in order to preserve the transportation system of a large city.

The Circuit Court below properly pointed out that "the corporate fiction can be given effect in some instances and with perfect consistency disregarded in other instances" (R. 949-950). The Circuit Court cited *Irving Trust Co. v. Kaminsky,* 22 F. Supp. 362 (D. C. S. D. N. Y. (1936), which relied upon the decision of this Court in *Corsicana Nat. Bank v. Johnson,* 251 U. S. 68, 88, 89, 40 S. Ct. 82 (1919).

CONCLUSION

The decision of the Circuit Court below correctly applied the law to the unique factual record presented—a record of unexampled physical, corporate and financial confusion among 50 corporations whose properties are involved inextricably in a single public service enterprise. Failure to grant the relief so urgently called for would be a confession of impotence on the part of the federal courts to deal equitably and realistically with a problem which, though unexpected and hence not explicitly covered by statute, was intended by the Congress to be within the jurisdiction of the bankruptcy court to solve.

The Circuit Court's decision does not call for review by this Court. The petitions for certiorari should therefore be denied.

Respectfully submitted,

ANNE X. ALPERN,
City Solicitor

LEON WALD,
Assistant City Solicitor

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

In the Matter of Pittsburgh Railways Company, Debtor.

NO. 361.

PHILADELPHIA COMPANY, Petitioner,
v.
HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee for Southern Traction Company 50-Year First Mortgage and Collateral Trust 5% Gold Bonds.

NO. 364.

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,
v.
HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee, etc.

On Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

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On Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR HORACE F. BAKER AND JOHN A. BEATTIE, PROTECTIVE COMMITTEE FOR HOLDERS OF BONDS OF SOUTHERN TRACTION COMPANY.

OPINIONS BELOW.

The opinion of the District Court (R. 133 a) is reported in 60 F. Supp. 600. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 939) is reported in 155 F. (2d) 477.

JURISDICTION.

The orders of the Circuit Court of Appeals were entered on May 7, 1946 (R. 952-954). A petition for clarification of the opinion and orders was denied without opinion on June 28, 1946 (R. 970). A petition for writ of certiorari was filed on August 5, 1946.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Respondents adopt the statement of the questions presented as it appears in the brief of the City of Pittsburgh filed at No. 361.

STATEMENT.

Respondents adopt the statement of the case as it appears in the brief of the City of Pittsburgh, but add certain facts applicable to this petition.

On July 24, 1941, Horace F. Baker and John A. Beattie were appointed a Protective Committee for Southern Traction Company 50-year First Mortgage and Collateral Trust 5% Gold Bonds of the Southern Traction Company. These bonds were issued under an indenture, dated October 1, 1900, of the Southern Traction Company (the corporate title of which was later changed to Pittsburgh Railways Company). A total of $4,000,000 of bonds are outstanding under this indenture, and of this

amount $1,338,000 in par value, or 33.5% are owned by the Philadelphia Company (City Ex. 8; SMR, Par. 46-1).

The mortgage securing these bonds is a lien upon "all the property, real, personal and mixed, now owned, or hereafter acquired, together with all the rights, privileges and franchises which it now owns or may hereafter acquire". (SMR, Par. 60).

Since 1902 Philadelphia Company has owned all of the common and preferred stocks of the Southern Traction Company, later the Pittsburgh Railways Company (SMR, Par. 18).

Pittsburgh Railways Company owns all of the common stock of the United Traction Company of Pittsburgh, and of 25 other underlying street railway or traction companies (SMR, P. 42).

As stated on Page 11 of the petition of the Philadelphia Company "Since 1902 all of the property of Pittsburgh Railways Company and the underlier companies has been operated by Pittsburgh Railways Company as a unified street railway system, pursuant to the leases and operating agreements above referred to (R. 667, SMR 211 *et seq.*)."

ARGUMENT.

I.

THE PHILADELPHIA COMPANY, WITH THE CONSENT AND COOPERATION OF THE UNDERLIERS, HAS EFFECTED A MERGER IN FACT OF THE UNDERLYING COMPANIES WHICH FORM THE PRESENT SYSTEM.

The record establishes the following facts:

1. ROLLING STOCK. The rolling stock owned by the Southern Traction Company, now Pittsburgh Railways Company, and by the underliers when the Philadelphia Company acquired control in 1902 has been worn out or disposed of without setting up any fund for its replacement. There has been substituted other rolling stock purchased out of the fares which under the terms of the leases Pittsburgh Railways Company was entitled to receive from the operation of the system as a whole. The rolling stock which was security for the payment of the bonds of the Southern Traction and the underliers has completely disappeared.

The Master found that on January 1, 1902 Pittsburgh Railways and 16 underliers had approximately 1,200 passenger cars and 119 miscellaneous cars, and of these, only 32 service cars now remain (SMR, Pars. 514, 631). The usual life of passenger cars is about 20 years (SMR, Par. 632).

In the Pittsburgh Railways system there are now 1,053 passenger cars of which 401 are of the new improved type known as PCC cars, acquired in 1936 or later (SMR, Par. 635). No cars are allocated to any underlier.

2. CAR BARNS. Twenty car houses which existed in 1902, have been razed or sold (SMR, Par. 513). Three were in the Pittsburgh system, 12 in the United system and 5 in the Consolidated system (SMR, Par. 571). At present there are 14 car houses in use and 3 not in operation. Two of these are used to house cars without regard to the lines of separate underliers. If the entire railway system were split into three segments—, Pittsburgh, United and Consolidated—as suggested by the Philadelphia Company, each of the three systems would not have car barns available. For example of 32 car routes composing the former United system, 11 are served by car houses belonging to lessors of United, 5 by car houses owned by Consolidated or its lessors and 16 by car houses owned by Pittsburgh (SMR, Pars. 572-575).

3. CAR SHOPS. Prior to 1926 there were four active car shops in operation, one on land owned by Pittsburgh Railways, one on land owned by lessee of United Traction and two on land owned by Consolidated Traction. Two of these shops have been disposed of and the others abandoned. All of the shop equipment has been concentrated, and all of the shop work is now conducted at the Homewood Shop (SMR, Par. 652).

4. POWER PLANTS. At least eight power generating stations which existed in 1902 and were owned by underliers have been disposed of and neither Pittsburgh Railways nor any underlier has any power generating system. Of the former 8 generating stations, three were discontinued about 1904 and five were sold to Duquesne Light Company in 1913 (SMR, Par. 512). In lieu of these power stations a contract was entered into in 1913 between Pittsburgh Railways Company and Duquesne

Light Company, both of whose stock is owned by Philadelphia Company, providing that Duquesne should furnish all power for the purposes of Railways for a period of 50 years (SMR, Par. 528). By this means Philadelphia Company diverted a large revenue from the underliers and transferred it in effect to itself. Pittsburgh Railways today has no facilities for generating power to operate its cars (SMR, Pars. 522-525).

5. RAILS, SWITCHES, ETC. The rails, switches and other track equipment, poles, transmission lines and wires of Pittsburgh Railways and the underliers have been allowed to wear out without any fund for their replacement and for them has been substituted other equipment purchased out of the general funds of the Pittsburgh Railways Company so that the rails, switches, track equipment, poles, transmission lines and wires which were owned by Pittsburgh Railways and the underliers and were security for their bonds have completely disappeared.

6. CAR ROUTES. Car routes and schedules have been arranged without taking into account the limits of the original system of the Pittsburgh Railways or any underlier so that Pittsburgh Railways and the underliers have no separate business. There are a total of 82 routes which use the franchises of 44 companies. Of the 82 existing routes, 53 operate in continuous service over the lines of 4 or more different underliers. 5 routes operate over lines of 10 underliers, 3 over 12 and 1 over 13 (SMR, Par. 712). One route operates lines franchised to 10 companies, making 30 changes from the lines of one to those of another in the course of a round trip (SMR, Par. 723).

7. FARES. No separate fares are collected for the use of the Pittsburgh Railways system or any underlier, and no separate account of the earnings is kept. For many years the receipts from the lines franchised to all of the companies have been mingled in a common treasury, so that it is impossible to determine the receipts of any underlier or its share in the common fund.

8. DISBURSEMENTS. Fares collected from the entire system and other income have been used indiscriminately to meet interest charges, rentals and other obligations of the multitude of corporations included in the system.

9. REPAIRS. Philadelphia Company has imposed upon Pittsburgh Railways by leases and operating agreements, the obligation to keep in repair and furnish with equipment the numerous other lines belonging to companies whose stocks are owned directly or indirectly by Philadelphia Company.

10. FRANCHISES. The franchises of Pittsburgh Railways and the underliers have been interwoven in the operation of the system as a whole, with the result that these franchises have been deprived of any separate business and their value greatly diminished.

11. MANAGEMENT. The operation and management of Pittsburgh Railways and the underliers have been conducted by a common staff of officials, many of whom are also employees of the Philadelphia Company, so that neither the Pittsburgh Railways nor any underlying company has any separate organization or administrative staff.

To summarize, the separate underliers have no power plants or means of generating current, no car shops, no car barns and no rolling stock and no separate staff for management or operation. Rails, switches, poles and transmission lines have been allowed to wear out and for them has been substituted other equipment purchased out of the general funds of the Pittsburgh Railways Company. In general, this equipment is heavier and more expensive than that which it replaced, although the leases from underliers commonly required the Pittsburgh Railways Company as lessor to deliver upon termination of the lease only "like or similar personal property of value equal to the amount of said inventory" which was to be made at the beginning of the lease (See Monongahela Street Railway Company lease, Ex. 3, Document 6).

From the foregoing facts, it appears that the Philadelphia Company, with the active cooperation and consent of the underliers, has effected a merger in fact of the assets of the Pittsburgh Railways Company and the underlying companies, as complete as if a merger in law of the respective corporations had been carried through. The effect has been to deprive the holders of bonds of the Pittsburgh Railways Company and other underlying companies of virtually all of the security which the bonds had when they were issued. Substantially no security remains except a few odd pieces of real estate and franchises which are so enmeshed with franchises of other underliers that an underlier has no separate business and its franchise has no value except as a link in a larger system.

Because the separate property of the underlier no longer exists, the value of its bonds depends almost

entirely upon the operation of the railway system as a whole. If the system is broken up by foreclosures, the recovery of a bondholder of an underlier will amount to little.

As this court said in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 671 (1935):

> "* * * A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. * * *"

II.

THE FEDERAL COURTS HAVE DISREGARDED THE SEPARATE ENTITY OF A CORPORATION WHENEVER NECESSARY TO ACCOMPLISH THE PURPOSE OF AN ACT OF CONGRESS.

In no other jurisdiction is there such a large body of decisions disregarding the legal entity of a corporation, as is found in the decisions of the federal courts. The reason is to be found in the paramount purpose of these courts not to permit the existence of a technical corporation to defeat the application of an Act of Congress.

For example, such decisions have been found necessary in order to give effect to the Sherman Anti-trust Law, the commodities clause and the prohibition against discrimination in the Interstate Commerce Act, the income tax laws and the Bankruptcy Act.

This principle is frequently applied where as in this case, the assets and business of two or more corporations have been commingled and managed as a single unit. Our research, however, has found no case in which the separate units have been so thoroughly oblit-

erated or the merger so completely effected as in the case of the Pittsburgh Railways.

In *Southern Pacific Terminal Company v. Interstate Commerce Commission,* 219 U. S. 498 (1911), the Terminal Company, though not a common carrier, was ordered not to discriminate in wharfage charges.

This court said:

> "* * * * The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system, of which all are necessary parts, the Terminal Company as well as the railroad companies. * * * (521)
>
> "* * * And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it. In all transactions it is treated as single." (523-524)

Again in *Southern Pacific Co. v. Lowe,* 247 U. S. 330 (1918), this court found occasion to ignore the separate corporations of the Southern Pacific system, saying:

> "* * * While the two companies were separate legal entities, yet in fact, and for all practical purposes they were merged, the former being but a part of the latter, acting merely as its agent and subject in all things to its proper direction and control. * * *" (337-338)

It is true that the stock of some of the subsidiary corporations is owned, not by the Pittsburgh Railways

Company, but by the Philadelphia Company which holds the stock of the Pittsburgh Railways. In *United States v. Reading Company et al.,* 253 U. S. 26, the stocks of the railroad company and of the coal company were owned by a common parent corporation.

Petitioners argue the underlying corporations were legally created under the laws of Pennsylvania. This was true generally in this line of decisions. In fact, if the corporation were not legally chartered, there would be no corporate entity to disregard.

The outstanding decision in *Northern Securities Company v. United States,* 193 U. S. 197, has points of similarity. There this court said:

> "* * * Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. (333) * * * Every corporation created by the State is necessarily subject to the supreme law of the land. * * *" (346)

Recently, in *Anderson v. Abbott,* 321 U. S. 349, this court said:

> "* * * It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether, that was the aim or only the result of the arrangement. (362-363) * * * The policy underlying a federal statute may not be defeated by such an assertion of state power." (365)

In this case at bar the facts present a problem of reorganization which clearly falls within the scope and purpose of the Chandler Act. The ruling purpose in the reorganization of a railroad or public service company is to reorganize the properties and assets which have been

devoted to public use into a new agency which will be able to continue to serve the public. The corporations have been merely the legal custodians. Here especially the court must look at realities, not fictions. Unless the court may disregard the separate existence of the underlying corporations, no effective reorganization of the street railway system of the Pittsburgh district as a whole is possible.

III.

PHILADELPHIA COMPANY AND THE UNDERLIERS HAVE ESTOPPED THEMSELVES FROM OBJECTING TO A SYSTEMWIDE REORGANIZATION WHICH WILL INCLUDE ASSETS OF THE UNDERLIERS WHICH ARE INTERMINGLED WITH THE ASSETS OF THE PITTSBURGH RAILWAYS COMPANY.

Before the Philadelphia Company got control of Southern Traction and the underliers, each of these was a complete railway system, controlling its own fares and paying interest on bonds and operating expenses. Each had a complete railway system which was security for the bonds which the underlier had issued.

In 1902 Philadelphia Company and the underliers by corporate proceedings, approved by stockholders and directors, joined in combining Pittsburgh Railways and the underliers into a single street railway system. They executed leases and operating agreements which made it possible for Pittsburgh Railways to operate their respective properties as a unit. What had been before a number of separate units became a single system. Philadelphia Company and the underliers sanctioned this; and permitted the properties of the separate companies to be welded into a single unit; the separate equipment of each underlier to be used interchangeably on the whole system, to be worn out and disposed of without

being replaced; the fares collected on the respective routes to be paid into a common treasury for the whole system without any attempt to ascertain how much was earned by each underlier, and this common fund of receipts to be expended in the payment of interest charges, operating expenses and many other items for any unit of the system and without reference to how much any particular company contributed to the common fund.

For 44 years the Philadelphia Company and its underliers have permitted this gradual amalgamation of the system and the mingling of assets and cash fares to be carried on without objection on their part. They have permitted books to be kept and financial statements to be issued for the system as a whole and not for any separate underlier.

The members of the general public have adjusted themselves to the operation of the system as a whole, have located residential districts, shopping areas and great industries and arranged their affairs so as to take advantage of a single system which enables them to reach every point in a large community. Their patronage has supported and built up this integral system of transportation. Philadelphia Company and the underliers may not now take back their properties and break up this unified system. A Bankruptcy Court is charged with the duty of administering principles of equity and may not release them from their duty to serve the public with adequate facilities.

In view of these circumstances, we submit, Philadelphia Company and the underliers are now estopped to object to a plan of reorganization which will include the assets of the underliers which were part of the system.

Again as a result of the acts of the Philadelphia Company and the underliers the public use to which these separate street railway companies were devoted, has been changed. The separate public use of each underlier has been abandoned. The underliers are now devoted as a whole to public use. This combined public use as a system has been recognized by the Public Service Commision of Pennsylvania.

In a former proceeding, *City of Pittsburgh v. Pittsburgh Railways Company,* 8 Pa. Corp. Rep. 441 (1920) before the Public Service Commission of Pennsylvania, the commission said of the Pittsburgh Railways Company:

> "Disintegration of the system into its component parts, and these separately operated, presents a threatening situation so detrimental and dangerous to the public interests of Pittsburgh that every reasonable effort ought to be put forth to avoid it." (446)

The Philadelphia Company and their underliers have devoted their respective properties owned or controlled by them to a combined or unitary public use, and they cannot now withdraw them from such use or abandon such use.

The public use to which underliers is today devoted, is not a separate public use but a common systemwide public use. For 44 years a separate underlier has wholly abandoned the separate function or use and has allowed the property and equipment essential to the exercise of its public franchises to be made a part of the unitary system and to be used therein until worn out or otherwise disposed of, and to be replaced by other property and equipment purchased from earnings of a sys-

tem as a whole. The underlier has disabled itself from performing its public function as a separate street railway. The underlier has permitted its franchises to become inextricably involved in a mass of other franchises employed in carrying out a unitary system of street railway transportation.

Philadelphia Company and the underliers are now estopped from breaking up this common system and destroying the greater public use to which their franchises have been devoted and attempting to resume a separate public use which has not existed for 44 years.

Respectfully submitted,

H. F. STAMBAUGH,
Attorney for Respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY, DEBTOR

No. 359

PHILADELPHIA COMPANY, PETITIONER

v.

JULES GUGGENHEIM ET AL.

No. 360

PHILADELPHIA COMPANY, PETITIONER

v.

CITY OF PITTSBURGH

No. 361

PHILADELPHIA COMPANY, PETITIONER

v.

HORACE F. BAKER AND JOHN A. BEATTIE, PROTECTIVE COMMITTEE, ETC.

No. 362

MONONGAHELA STREET RAILWAY COMPANY AND PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, PETITIONERS

v.

JULES GUGGENHEIM, ET AL.

No. 363

MONONGAHELA STREET RAILWAY COMPANY AND PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, PETITIONERS

v.

CITY OF PITTSBURGH

No. 364

MONONGAHELA STREET RAILWAY COMPANY AND PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, PETITIONERS

v.

HORACE F. BAKER AND JOHN A. BEATTIE, PROTECTIVE COMMITTEE, ETC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

PRELIMINARY STATEMENT

The Securities and Exchange Commission, pursuant to Section 208 of the Bankruptcy Act (Act of June 22, 1938, c. 575, § 1, 52 Stat. 894, 11 U. S. C. § 608), became a party to the proceedings for the reorganization of Pittsburgh Railways Company, debtor, under Chapter X of the Bankruptcy Act in the District Court for the Western District of Pennsylvania. The district court, adopting a Special Master's findings of fact with immaterial modifications, and also his conclusions of law, held that it lacked jurisdiction to comprehend in the debtor's reorganization numerous so-called underlier corporations comprising integral parts of the debtor's street railway system. The Commission had taken a contrary view before the district court and was a party to the appeals from its order. The circuit court reversed, holding that the necessary jurisdiction existed.

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 939–952) is reported at 155 F. (2d) 477. The opinion of the district court (R. 133a–151a) is reported at 60 F. Supp. 600.

JURISDICTION

The judgments of the circuit court of appeals were entered May 7, 1946 (R. 952–954). A petition for clarification of opinion was denied June

28, 1946 (R. 955–964, 970). Petitions for writs of certiorari were filed August 5, 1946. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938, 28 U. S. C. § 347.

QUESTION PRESENTED

Whether a reorganization court for the debtor, which operates an inextricably integrated urban traction system comprising its properties and those of forty-nine "underlier" corporations, can assert jurisdiction over such corporations and their properties for the purpose of entertaining a plan of reorganization comprehending the entire system, where the properties in question are in the custody of the court, where the functional unity of the system as well as the public interest prevents its dismemberment, where the underliers' right to repossession under their leases and operating agreements is therefore purely theoretical, where the bulk of the underliers are insolvent, and where no feasible alternative appears to a system-wide reorganization.

STATEMENT

In the view of the Commission, the determination of the question of jurisdiction depends wholly upon the unusual factual situation the case presents. It is impracticable to present here all the details and complexities confronting the courts

below; accordingly we confine our statement to the facts that are important to an understanding of the Commission's position. Basic to its views is the finding that the assets comprising the debtor's street railway system have for nearly half a century been operated as an inseparable economic and physical unit (R. 951).

Formation of the system—The underliers

The present system came into being in 1902, when several transit groups operating in Pittsburgh were amalgamated by Philadelphia Company, petitioner in Nos. 359–361, into one unified system operated by the debtor, which it controlled (R. 639, ¶¶ 91–92[1]). This was the culmination of a process of integration which, assertedly pursuant to Pennsylvania statutes authorizing street railway unification,[2] had been under way previously and in which Philadelphia Company participated (R. 632–638, ¶¶ 61–82). The 1902 unification took the form of (1) long-term leases from several underliers to Consolidated Traction Company and United Traction Company of Pittsburgh (both being underliers whose stocks were controlled by Philadelphia Company and both already lessees of numerous other underliers) (R.

[1] Paragraph references are to the Special Master's Report (R. 604–837) on the petition of the City of Pittsburgh (R. 40a–83a) to assert jurisdiction over the underliers. A summary of the facts found by the Special Master appears in his report at R. 806–814, ¶¶ 1001–1026.

[2] See statutes cited at R. 948, n. 11, 12; R. 826–828, ¶ 1072.

634–635, ¶ 68; R. 637–639, ¶¶ 75–78, 92) and (2) so-called short-term operating agreements authorizing the debtor to operate the properties owned by or leased to United and Consolidated.

The system at present contains 49 underliers over which jurisdiction was asserted.[3] Of these, 36 are controlled by the debtor by 100% or majority stock ownership, or are its affiliates through similar stock ownership by Philadelphia Company, the debtor's parent (R. 806, ¶ 1001). These 36 are referred to as "Philadelphia Underliers." The stocks of the thirteen other underliers, while largely held by the public (*id.*), are in part owned by Philadelphia Company (R. 618, ¶ 26), and these underliers are in addition linked to the debtor by physical and contractual ties. Of the 13, nine (4 companies, one having stock control over 5 others, R. 794–803, ¶¶ 831–876; R. 538a–539a) are the so-called "Guaranteed Underliers,"[4] whose leases were guaranteed by Philadelphia Company.

These guarantees resulted from a contract, entered into as part of the 1902 unification, between Philadelphia Company and A. W. Mellon, then in control of Pittsburgh & Birmingham Trac-

[3] The underliers are listed at R. 77a–80a, and tables and charts of their intercorporate relations appear at R. 81a, 82a, 538a, 539a, 584, 650–651, and 846. In addition to the 49 underliers there are 3 others over which jurisdiction was not sought (R. 547).

[4] One other Guaranteed Underlier, Mount Oliver Incline Railway Co., is not included in the total of nine. It is one of the three underliers over which jurisdiction was not sought.

tion Company and Monongahela Street Railway Company. Pursuant to the contract, the two Mellon companies executed 900-year leases of their properties[5] to United and Consolidated, respectively, while a third company, Suburban Rapid Transit Railway, executed a similar lease of its properties to Consolidated (R. 639–643, ¶¶ 91–122). These leases imposed upon United and Consolidated the obligation, *inter alia,* to pay as rentals to the lessor companies sums "available for dividends" on their stocks, to pay the lessor companies' taxes, to meet their interest payments and to "unite" in meeting their maturities (R. 889–892, 906, 908, 926, 928). These lease obligations were undertaken by the debtor pursuant to its contemporaneous operating agreements with United and Consolidated (R. 654, 655, ¶¶ 164, 166). Performance by the lessees under the three leases was guaranteed by Philadelphia Company (R. 900, 909, 936). The principal companies among the nine Guaranteed Underliers are the petitioners in Nos. 362–364.

The four remaining companies, whose stock is publicly held and whose contractual ties with the debtor lack Philadelphia Company's guarantee (R. 804–806, ¶¶ 891–901), are called "Unguaranteed Underliers."

[5] The properties of Pittsburgh & Birmingham comprised leasehold interests conveyed by its five stock-owned companies and one other lessor company (R. 798, ¶ 851, R. 902–905).

The foregoing three groups of underliers, together with the debtor and some other companies not here involved, comprise the present system.

Unitary character of the system

The properties of the debtor and the underliers are operated by the debtor through a complicated series of direct and indirect leases, assignments and operating agreements (R. 648–653, ¶ 158). Since the 1902 amalgamation, operations have been conducted on a unified basis, and with a commingling of the properties of the debtor and the individual underliers and a disregard of the corporate entities of most if not all of them.

The system is centrally administered (R. 667-669, ¶¶ 214–219). Routes, schedules, fares, transportation, maintenance and renewals, and accounting for revenues and expenses are performed on a system-wide basis, with no concern for the underliers (R. 669–675, ¶¶ 221–255; R. 540a). As the court below observed (R. 945–946):

> * * * the system operates as a unit. This is more clearly demonstrated when a few particulars are given. For instance, one trolley route covers thirty different franchise segments belonging to ten underliers. Other routes use the franchises of thirteen different underliers. Operating employees know nothing about the separate

underlying companies and neither does the travelling public. All receipts are put in a common pot.

Underliers' assets have been commingled and disposed of in accordance with system needs. Under the debtor's control of the system, numerous stretches of underliers' franchised track were abandoned (R. 730–733, ¶ 515), and reconstitution of the lines of the pre-1902 operating companies is either impossible (R. 795, 799, ¶¶ 834, 852) or would require extremely impracticable rearrangement of trackage rights (e. g., R. 758–770, ¶¶ 671–702). In 1902 the underliers owned nearly 1,300 cars; only 32 of these remain, none in passenger service (R. 729–730, ¶ 514), and title to the 1,000 passenger cars now in use has been taken in the name of the debtor, whose property they are presumed to be (R. 754, 739, ¶¶ 633, 541). Power properties and carhouses belonging to underliers in 1902 have been dismantled, razed or sold (R. 727–729, ¶¶ 512, 513; R. 733–738, ¶¶ 517, 521–529); those remaining are put to the service of system needs rather than to the use of the underlier having record title to them (R. 738, 745, ¶¶ 525, 572). Separate repair shops have been closed, the system now utilizing one central shop (R. 756, ¶¶ 651–652), located on the lines of an underlier (R. 406a–408a).

During the 40-odd years of the system's control by the debtor, much if not all of the underliers' physical properties has been retired from use and has been replaced by the debtor. In a registration statement filed with the Securities and Exchange Commission in 1941, Philadelphia Company, after a brief inventory of the system's assets, stated (R. 466a):

> Very little, if any, of the above enumerated property, other than land and buildings, was in existence at the time the Pittsburgh Railways System was unified in 1901 through leases, operating agreements and stock ownership. Most of it represents replacements and betterments either in respect of property in existence at that time, or as is more frequently the case, in respect of replacements to or betterments of such property. An accurate determination of what corporation in the system now has title to particular units of property, such as cars, tracks and overhead structures, would, in many instances, be most difficult and might involve recourse to the courts, and no attempt is made herein to allocate such property to the several corporations which comprise the system.

The treatment of the Guaranteed Underliers' properties in the unified operation was identical with that accorded the assets of the other underliers. The commingling, abandonment, disposal,

alteration and replacement of system property have applied equally to the Guaranteed Underliers.[6]

Thus, none of these companies has kept any records of its properties since 1902 (R. 795–796, 800, 803, ¶¶ 836, 838, 859, 872–873). Two officers of Suburban expressly admitted that they could not at present identify its properties (R. 523a–527a, 535a–537a). An officer of Monongahela, Pittsburgh & Birmingham and the latter's subsidiaries made a similar admission as to properties other than real estate, franchises and rights of way (R. 505a–508a). The president of Pittsburgh Incline Plane Co., another Guaranteed Underlier, was not sure of what its properties consisted, or when they were electrified, or whether its lease gave it an absolute right to the electrical equipment installed since the date of the lease (R. 535a–536a). The officers of these companies be-

[6] Alteration of routes, R. 762–763, 795, 799, ¶¶ 692 (3), 834, 852.

Abandonment of track, R. 762, 795, ¶¶ 692 (2), 834.

Disposal of real estate, R. 795, 798, ¶¶ 834, 849.

Sale of power plants, R. 727, 800, ¶¶ 512, 858.

Dismantling and disposal of car barns, R. 728–729, ¶ 513.

Replacement of original track and overhead, R. 508a–510a; R. 798, ¶ 848.

Relocation of original poles and feeder wires, R. 510a–511a; R. 798, ¶ 848.

Abandonment of bridges, R. 798, ¶ 848.

Scrapping of original rolling stock, R. 795, 796, 798, 799, ¶¶ 834, 838, 848, 851, 856.

See generally, R. 733–737, ¶ 517.

lieve a continuation of unified operation desirable, have not contemplated withdrawal of their properties from the system, and have no plans to resume separate operation (R. 383a–400a; R. 796–797, 801–802, 803, ¶¶ 841, 863–864, 876). The Special Master found that separate operation of the Guaranteed Underliers was "not a very practicable proposition" (R. 803, ¶ 880). It is inconceivable in any case that they could undertake independent public service.

Since 1902 these companies' only business has been the receipt of rentals and other income under their leases and the disbursement of bond interest and dividends (R. 185a, 187a, 191a; R. 795, 798, ¶¶ 833, 847). Irrespective of the insolvency of the debtor's street railway system as a whole, they are concerned only with the revenues they derive from the "beautiful guarantee of the Philadelphia Company" (R. 393a, 397a, 797, 802, ¶¶ 842, 864–865). They have acquiesced in the amalgamation of their properties into a single system from which they cannot withdraw.

The unitary character of the system is further indicated by various factors concerning the debtor and the Philadelphia Underliers evidencing the disregard of their separate corporate entities. Among other points may be noted a thorough interlocking of the officers and directors of the debtor and these underliers with their common parent, Philadelphia Company (R. 698–700, ¶¶ 382–390); various adjustments of operating

deficits through intercorporate loans, security transfers and other devices (R. 704–706, 720–724, ¶¶ 405–416, 474–482); the payment of dividends to Philadelphia Company simultaneously with the taking of loans from it (R. 702, 720, ¶¶ 395, 474–475); and the lack of books or the maintenance of only skeleton books by various underliers (R. 678, ¶ 283; cf. R. 301a). While numerous leases contained provisions specifying whether or not a lessor underlier was chargeable by its lessee for capital expenditures on the lessor's lines (R. 690–695, ¶¶ 344–355), the provisions were in practice not observed (R. 690, 810, ¶¶ 344, 1011), resulting at present in the virtual unascertainability of sums owing the underliers or the debtor on account of such expenditures (R. 575–576; cf. R. 689, 697–698, ¶¶ 339, 366). Accounting for capital expenditures subsequent to 1924 was admitted by Philadelphia Company's expert accounting witness to be "largely a matter of convenience in bookkeeping" (R. 332a). There were other accounting practices which were inconsistent with the status of the debtor and the Philadelphia Underliers as independent entities (R. 698, ¶¶ 367–370).

The system in reorganization—The guarantee problem

Almost since its inception the enterprise has had repeated and mounting deficits because of its crushing burden of fixed charges (R. 701,

¶ 391). Neither minor palliatives nor efforts at major adjustments, including an equity receivership in 1918–24 (which, however, failed to modify the debtor's obligations appreciably, R. 718–719, ¶¶ 470–471), proved availing. On May 10, 1938, at the instance of Philadelphia Company (R. 724, ¶ 483), the debtor filed a voluntary petition for reorganization in which it stated:

> A financial reorganization of the Debtor is imperative to the end that its street railway system may be continued as a unified system of transportation and the Debtor may continue to render adequate public service. [Not in printed record.]

Since that time the entire system has been in the custody of the court, the trustees continuing the system's operation on its unified basis (R. 58a; R. 675, ¶¶ 256–262). They have since neither affirmed nor disaffirmed the debtor's leases and operating agreements and have made no payments to the underliers for use and occupancy or on the debtor's lease or contract liabilities.

The two types of the debtor's obligations should be distinguished—interest requirements on the debtor's own outstanding securities, and fixed charges imposed upon the debtor by its undertakings pursuant to the leases and operating agreements running to it. As of May 10, 1938 the annual requirements on the debtor's out-

standing securities (other than car trust bonds) were as follows:[6a]

Bonds and collateral notes	$424,032
Interest on demand notes, approximately	500,000
Total, approximately	924,032

As of the same date the annual fixed charges of the debtor pursuant to its leases and operating agreements (other than on securities intercompany owned) were nearly three times this amount, as follows:

Rentals to underliers	$829,775
Interest on underliers' bonds	1,516,645
Interest on underliers' demand notes, approximately	100,000
Total, approximately	2,446,420

Of this sum of $2,446,420, the amount of $898,920[7] is an annual charge payable by the debtor to the Guaranteed Underliers (R. 585–588, Com-

[6a] The figures in this and the following table have been compiled from R. 585–588.

[7] The court below put the sum so owing at "half a million dollars a year plus taxes" (R. 951). It presumably arrived at this figure from R. 619, ¶ 32, which states that "In 1941, the net amount paid out by Philadelphia Company under the guaranteed leases was $467,413.52", exclusive of taxes. This, however, was a net figure, and did not include payments of rentals available for dividends on stocks of the Guaranteed Underliers or interest on their bonds held by Philadelphia Company itself, (*ib.* cf. R. 721–722, ¶ 480). On such stocks and bonds it would be unnecessary for Philadelphia Company as guarantor to make a circuitous payment to itself, but the debtor was nevertheless obligated on them under operating agreements to which it was a party.

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panies Nos. 29–36, 42, 45), in addition to those companies' taxes.[8]

The existence of the guaranteed leases is assigned as a principal reason for the impasse in the reorganization which has been pending for eight years.

Asked in hearings before the Special Master why Philadelphia Company, after bringing the system into the custody of the court, objected to the inclusion of the underliers in the reorganization, its senior vice-president and general counsel (R. 156a) gave two reasons. First, he stated, the company was charged with wrongdoing in the petition of the City of Pittsburgh initiating the present proceeding, and it felt obliged to resist (R. 727, ¶ 510).[9] Secondly, he gave it as his legal opinion that if the leases guaranteed by Philadelphia Company were to be terminated or destroyed by operation of law, without the participation or acquiescence of Philadelphia Company, the guaranteed lessors would be limited to the

[8] While under *Philadelphia Company* v. *Dipple*, 312 U. S. 168, the trustees have not paid the taxes owed by the underliers, the liability of the debtor for such taxes, including those owed by the Guaranteed Underliers, cannot be disputed. Cf. *Monongahela Street Ry. Co.* v. *Philadelphia Company, et al.*, 350 Pa. 603, 39 A. 2d 909, which held Philadelphia Company liable as guarantor for taxes owed by a Guaranteed Underlier. See R. 796, 800–801, ¶¶ 840, 861, 862.

[9] It should be noted, however, that Philadelphia Company opposed the inclusion of the underliers even prior to the City's petition (R. 724–726, ¶¶ 484–490).

assertion of a claim for damages not exceeding three years' rent (apparently under Section 202 of Chapter X, 11 U. S. C. § 602), and the liability of Philadelphia Company as guarantor would be limited correspondingly. This limitation, he feared, would not be available if Philadelphia Company could be successfully charged with having aided or acquiesced in the termination of the leases (R. 726, ¶ 491), which would presumably be possible if jurisdiction were held to encompass the underliers. In preference to its aiding a systemwide plan, therefore, Philadelphia Company, continuing the payments on its guarantees, has refused to place its underliers in reorganization voluntarily,[10] except on obviously impossible conditions (R. 724–726, ¶¶ 487–490), and has opposed systemwide jurisdiction. Its guarantee obligations have thus forced it to insist upon a position not only contrary to its understanding of reorganization practicalities but contrary to what it considers its own self-interest. Presumably, the reason for its objections to systemwide jurisdiction would be removed if such jurisdiction is imposed despite its best efforts to the contrary.

The Guaranteed Underliers, for their part, are presumably unwilling to litigate the extent of Philadelphia Company's liability on the guaran-

[10] The underliers' matured and unpaid bond issues are largely held 100% by Philadelphia Company or by the debtor (R. 539a; R. 629–631, ¶ 54; R. 721–724, ¶¶ 480–482).

tees any earlier than is essential. While the Philadelphia and Unguaranteed Underliers with debt securities outstanding have been found insolvent (R. 631, ¶¶ 55–56), and while, as to the Guaranteed Underliers, there is reason to believe that, were they dependent for their income solely upon their contribution to system earnings, they would also be insolvent, their solvency has been maintained by reason of Philadelphia Company's payments on its guarantees, and the Special Master found no insolvency as to them (R. 631, ¶ 57). They have denied the jurisdiction of the reorganization court over them.

With the reorganization thus deadlocked and in the unique situation presented by the foregoing combination of facts, the assertion of jurisdiction over the whole economic entity was the sole possible method for solving its interrelated financial problems.

ARGUMENT

The question presented arises out of the decision below that a reorganization court has the power, for plan purposes, to encompass corporations whose properties and economy are so inextricably commingled with those of the debtor in a single public utility operating unit, as to make their inclusion essential if the reorganization process is to be effective. While the fundamental question regarding the scope and flexibil-

ity of the Chapter X process in dealing with complex and relatively unique economic enterprises is important in the administration of the Bankruptcy Act, the precise issue here is not likely to be recurring, and since the holding below was clearly correct and no conflict of decisions is involved, it is our position that there is no occasion for further review.

1. A limitation of jurisdiction to the debtor alone would be useless as a means of achieving a reorganization. The debtor's fixed charges consist in only a minor degree of obligations on its own outstanding securities. The bulk of them, as we have shown, consist of rentals to underliers and liabilities on underliers' securities. These were assumed by the debtor pursuant to only seven leases and operating agreements running directly to it (R. 653–654, ¶¶ 161–163); other leases and agreements binding the debtor's system together run to various underliers, primarily United and Consolidated (R. 650–651). The reorganization process as applied to the debtor alone provides the means for the debtor's rejecting its seven undertakings, Bankruptcy Act, § 202, 11 U. S. C. § 602, but it provides no mandatory means for effecting their modification. So long as the court limits its authority to the debtor alone, modification of these contracts can be achieved only by the voluntary negotiation by the debtor and its seven contracting underliers of

new agreements on lower terms. The negotiations between the debtor and these mediate underliers, however, would require that such underliers, in turn, have some means of modifying their obligations to further lessor underliers and security holders. Efforts at voluntary negotiations would inevitably meet the resistance of hold-outs among security holders or lessor companies.[11] To bind dissenters, underlier companies in successive tiers would have to enter separate reorganization proceedings. Assuming this could be done without Philadelphia Company's assistance, which is doubtful, *supra,* n. 10, each such reorganization would be conducted with a wary eye watching the progress of all the others. Since the modification of each lease would be based upon a practical recognition of the inability of the debtor to meet existing rental charges, no single lessor could afford to accept a new lease at lower rental except in consideration of the simultaneous reduction of rentals on each of the other leases. For if the acknowledged objective of all the proceedings would be the continuation of the unified system on the basis of reduced intercompany obligations, each underlier and each securityholder would resist being subject to what it or he regarded as a disproportionately large cut (*cf.* R. 34a–35a). However, "one of the prime purposes

[11] *Cf.* R. 37a–39a.

of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another." *Young* v. *The Higbee Company,* 324 U. S. 204, at 210. A reorganization court should not subject securityholders to so doubtful a remedy as voluntary negotiations thus conducted, whose results depend on bargaining skill rather than a genuine attempt to ascertain values, and which can only generate pressures towards a larger and larger over-all capitalization.

Any alternative procedure which contains as one of its elements the separation of an important underlier's properties from the system must contemplate its separate operation as a working possibility. Since no such possibility exists,[12] any such alternative is obviously unfeasible. The trustee's power to reject the debtor's leases and

[12] *Cf.* the opinion of the court below (R. 941–942):

"* * * During the argument some suggestion was made by certain of the appellees that separate operation of certain of the underlying systems was physically possible. We do not doubt that fact. A trolley company with a franchise entitling it to run its cars on two city blocks may physically travel up and down that route. But nobody would contend that this kind of arrangement gave the type of public transportation service that a modern community needs. So here, even though some of the underlying companies have franchises for routes of very considerable distance and could, in some instances, get patrons into the center of town under their own separate systems, it is not seriously claimed that this method of operation would adequately meet community requirements."

agreements is therefore purely theoretical. So is his power to submit to a vote of security holders a genuine choice between their acceptance of a lease on lower terms or withdrawal.[13] The underliers and their security holders are similarly limited by the meaninglessness, on the facts here, of their theoretical right to repossession, and by the undoubted power of the reorganization court to preserve the unity of the system in the public interest. Their ability to compel the trustee to choose between affirmance and disaffirmance is therefore highly dubious, and so is their right to declare a forfeiture, assuming that such right exists at all without approval of the appropriate regulatory agency or perhaps the court. *Smith* v. *Hoboken Railroad, Warehouse and S. S. Connecting Co.,* decided April 29, 1946, No. 384, Oct. Term, 1945. It is significant on these points that, notwithstanding the fact, noted above, that neither payments of rent nor of use and occupancy have been made to the underliers since the inception of the reorganization and that the several leases and operating agreements have

[13] Such a set of alternatives, successfully presented to the Terre Haute security holders after this Court's decision in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 318 U. S. 523, see order of Sept. 19, 1945, in *Matter of Chicago, Milwaukee, St. P. & P. R. Co.*, N. D. Ill., E. Div., No. 60463, unreported, on its face implies that withdrawal of a company's properties from the system is physically and economically practicable.

been neither affirmed nor disaffirmed, no effort has been made by anyone to declare a forfeiture, to demand use and occupancy payments, or to compel an election by the trustee.

Other alternatives are equally unpromising. Straight bankruptcy proceedings are probably barred by statute to the debtor and the other system companies, because of the public interest in maintaining intact an operating public utility.[14] Dismissal of the Chapter X proceedings would invite the institution of individual actions seeking judgment or mortgage foreclosure. The consequent threat of the system's dismemberment would warrant a receivership. But apart from the fact that receivership proceedings are subject to the very vices and deficiencies that reorganization in bankruptcy was designed to remedy,[15] the receivership court would inevitably be confronted with the necessity in the public interest of exercising unitary jurisdiction over the entire system. With all its practical disad-

[14] Bankruptcy Act, § 4a, 11 U. S. C. § 22 (a); *Columbia Ry., Gas & Electric Co.* v. *South Carolina*, 27 F. 2d 52 (C. C. A. 4), affirming *In re Columbia Ry., Gas & Electric Co.*, 24 F. 2d 828 (E. D. S. C.); but *cf. In re Grafton Gas & Electric Light Co.*, 253 Fed. 668 (N. D. W. Va.).

[15] H. Rep. No. 1409, 75th Cong., 1st Sess., p. 37 *et seq.*; *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, 218–219; *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 448–450.

vantages, this procedure would still leave the court with the same legal problem which confronts it in this case; namely, whether it possessed the power to effectuate a reorganization plan for the entire system.

The court below, unwilling to permit the debtor and the underliers to remain indefinitely *in custodia legis* (R. 942–943), adopted the only available course in holding that jurisdiction for plan purposes extended to the constituent system companies. Any other result would have been an intolerable impairment of the functions of a reorganization court.

2. This ruling, required by a unique fact situation, was admittedly without direct precedent. There were, however, "signposts to mark the way," as the circuit court of appeals put it (R. 950), and its decision was along judicially accepted lines.

The traction properties of the underliers have all been in the possession of the reorganization court since the inception of the proceeding and in that of the debtor prior thereto. Such possession alone is sufficient to confer jurisdiction. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737–738. While with respect to property to which title is claimed adversely or as to which a lien is asserted, the court may confine the exercise of its powers to passing on the question of title or the

validity of the lien, the "malleable processes of courts in bankruptcy give assurance of a remedy than can be moulded and adapted to the needs of the occasion", *Steelman* v. *All Continent Company,* 301 U. S. 278, 290, and clearly permit jurisdiction to the extent defined by the court below.[16] The properties allegedly belonging to the debtor and individual underliers are, as we have shown, inextricably commingled. The value of any underlier's interest obviously depends on the utilization of its assets as part of the unitary system. In addition, there is a paramount public interest in retaining the system as a unit. Under such circumstances the court below was clearly correct in deciding that the interests of the various underliers and their security holders could be determined only by means of a systemwide reorganization plan, and that jurisdiction to this end existed.

A common administration of an insolvent parent and its subsidiaries where required by the facts has been held within the powers of a court in

[16] See, on the flexibility of the reorganization process, Byrne, *The Foreclosure of Railroad Mortgages in the United States Courts*, in *Some Legal Phases of Corporate Financing, Reorganization and Regulation*, 1917, p. 77; Cutcheon, *An Examination of Devices Employed to Obviate the Embarrassments to Reorganizations Created by the Boyd Case*, in 8 Lectures on Legal Topics, 1931, p. 35; Swaine, *Reorganization of Corporations: Certain Developments of the Last Decade*, id. at p. 133.

equity receivership (*Trustees System Co. of Penna.* v. *Payne,* 65 F. 2d 103 (C. C. A. 3); *Commerce Trust Co.* v. *Woodbury,* 77 F. 2d 478 (C. C. A. 8)), and in bankruptcy (*Central Republic Bank & Trust Co.* v. *Caldwell,* 58 F. 2d 721 (C. C. A. 8); *Stone* v. *Eacho,* 127 F. 2d 284, (C. C. A. 4), certiorari denied, 317 U. S. 635).[17] These cases were based on the often utilized principle that separate corporate entities will be ignored where their recognition would defeat the remedial purpose of a statute. E. g., *Anderson* v. *Abbott,* 321 U. S. 349, *Higgins* v. *Smith,* 308 U. S. 473, 477–8. On this ground jurisdiction was extended in the *Trustees System Co., Commerce Trust Co.* and *Central Republic Bank* cases, *supra,* to subsidiaries not alleged or found insolvent. The subjection of the Guaranteed Underliers here to the reorganization powers of the court is thus in accord with equity receivership and bankruptcy precedents.

Furthermore, insofar as system earnings are concerned, all the underliers appear to be insolvent. None of them is capable of functioning independently and of meeting obligations to both security holders and the public. And

[17] Language in *Price* v. *Gurney,* 324 U. S. 100, 107, indicating the necessity for the filing of a petition by a person authorized to do so by the terms of the Bankruptcy Act was not addressed to the situation where the disregard of separate corporate entities was involved, or where unlike that case (324 U. S. at 105) other remedies were unavailable.

a "unitary economic foundation" for the enterprise (R. 951) is, as the court below pointed out, impossible if the rental, interest and tax obligations of the Guaranteed Underliers alone are to be borne undiminished by the operations of the system. Whatever the effect of Philadelphia Company's guarantees, a fair and equitable equivalent, based upon the contribution of their assets to the earnings of the system, is all that the Guaranteed Underliers and their security holders can claim as against the debtor. *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.,* decided June 10, 1946, Nos. 278–282, Oct. Term, 1945, slip sheet opinion, pp. 26–27; *Wright* v. *Union Central Life Ins. Co.,* 311 U. S. 273, at 278.

The disregard of a corporate entity normally permits a court to look directly to the entity's stockholders or to an affiliate through stock ownership. Here the operational unity embraced the assets of the Guaranteed Underliers as inextricably as those of the Debtor and the other underliers. The Guaranteed Underliers knowingly contributed their properties to it and in the public interest it must be preserved unbroken. *Cf. Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co., supra,* slip sheet opinion at p. 29. Thus, notwithstanding the fact that the stockholdings linking the Guaranteed Underliers to the debtor were not as extensive as those linking the Philadelphia Underliers (R. 618, ¶ 26), there was an

adequate factual basis for the step taken by the court below.[18]

3. Because of the parties' contentions the opinion below discussed the question of a possible impingement of bankruptcy powers upon state law. But its holding that state law did not forbid or limit its jurisdiction in reorganization did not involve, either as a premise or a conclusion, the determination of any question contrary to state law.

None of petitioners contends that a systemwide reorganization, of itself, is contrary to Pennsylvania law in the sense that a state insolvency or equity receivership proceeding for a debtor under present circumstances has been held by a Pennsylvania court not to comprehend an aggregation of underliers comprising a unitary system. Nor was local law violated by any other ruling of the lower court. The circuit court of appeals did not hold that the underliers were not valid corporations. It did not hold that the leasing arrangements authorized by state law were invalid. It did not

[18] This question was not involved in *New York Trust Co.* v. *N. Y. & Greenwood Lake Ry. Co.*, No. 8943, 3d circuit, July 17, 1946, amended July 23, 1946, for there the appellee company, which, partially on the authority of the decision here sought to be reviewed, was subjected to the jurisdiction of the court in which Erie Railroad was in reorganization, was 95% stock owned by the Erie. The issue there was the power of a court other than the reorganization court to fix the fees of an indenture trustee and its counsel for services rendered the appellee.

hold that the leases were conveyances or had any legal effect other than that of leases.[19] It did not hold that, in determining the substantive rights of security holders to receive their equitable equivalents under a systemwide plan, the property which under state law is an underlier's should under the plan be treated as belonging to another underlier or as the debtor's. The prayer which it ordered granted, as pointed out by the Special Master, "asks for no surrender of anything in the possession of the underliers, and asks for no conveyance from or coercion of the underliers" (R. 815, ¶ 1052). The court merely held that with the debtor's system an integral unit, the formal intercorporate arrangements, while permitted under state law, could not thwart the indispensable exercise of bankruptcy jurisdiction (R. 948).

Petitioners contend, however, that state law was violated in that Chapter X of the Bankruptcy Act limits jurisdiction of the reorganization court

[19] We may add that, despite the absence of such a ruling by the court, we have serious question whether on the facts here, where effective repossession by lessor underliers is impossible and has not been attempted, the leases are anything other than security devices giving rise to contractual rights to repayment. Such rights are replaceable in reorganization by new evidences of interest, whose total will be commensurate with the earning power of the system and which will be distributed so as to give a fair and equitable equivalent of the rights they supplant. But the issue is not raised until the lessors' interests are so treated under a plan.

to the property of the debtor. Asserting that under state law the leases reserved property in the system assets to the underlier corporations, they argue that such property is beyond the jurisdiction of the court. The contention appears to be based on a misapprehension of the provisions relied on in its support.

Section 111 of Chapter X, 11 U. S. C. § 511, which confers upon the court "exclusive jurisdiction of the debtor and its property, wherever located" was not intended to confine the powers of the reorganization court to property to which a debtor had title. In straight bankruptcy, the court, upon adjudication, secures jurisdiction over all property in the possession of the bankrupt whether or not he has title. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, at 737. This was true also in equity receivership as to property in a debtor's possession within the territorial jurisdiction of the court. 2 Gerdes on *Corporate Reorganizations* (1936), pp. 1360–1365. The effect of the quoted language of Section 111, which also appears in Sections 77(a) and 77B(a), 11 U. S. C. § 205(a) and former § 207(a), was to extend the reorganization court's exclusive jurisdiction to property in the debtor's possession whether or not within the territorial jurisdiction of the court. Cf. *Continental Illinois Nat'l Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648. The language was not designed to deny to a re-

organization court jurisdictional powers, already vested in courts of straight bankruptcy or receivership, over assets in the possession of a debtor although admittedly not his property. On the contrary, under Sections 114 and 115 of Chapter X, 11 U. S. C. §§ 514, 515, such powers are expressly conferred upon the court in reorganization proceedings. See also Bankruptcy Act, Sections 2a, 2a (6), 11 U. S. C. §§ 11a, 11a (6). In the exercise of such powers the court may deal in a binding way with the reversionary interest of a lessor to a debtor. *Warren* v. *Palmer,* 310 U. S. 132, at 138.

Nor was Section 216 (2), 11 U. S. C. § 616 (2), permitting a plan to "deal with all or any part of the property of the debtor," designed to have a limiting effect. It was derived from Section 77B(b)(10), formerly 11 U. S. C. § 207(b)(10), see S. Rep. 1916, 75th Cong., 3d Sess., p. 34, and was intended, in the interests of flexibility, to permit a plan to deal with less than the entire estate. 2 Gerdes on *Corporate Reorganizations* (1936), p. 1760. Neither this provision, however, nor Section 111, *supra,* limits jurisdiction solely to assets over which the debtor has legal title under state law.[20]

[20] No acquiescence is intended by this argument in petitioners' contention that, on the facts here, the underliers have present legal title under state law to specific indentifiable assets in the system. See *supra*, p. 10.

Conceivably the differentiation of properties belonging respectively to the debtor and the individual underliers, insofar as is possible in their present commingled state, may become necessary or useful in determining such problems as the effect of after-acquired property clauses, the validity of liens or the value of collateral assets for purposes of distribution under a plan. The determination of these and similar issues by plan approval and confirmation may give rise to such reviewable questions as whether or not "appropriate regard" was shown "for rights acquired under state law," *Heiser* v. *Woodruff*, decided April 22, 1946, No. 496, Oct. Term, 1945, *cf. American Surety Co.* v. *Sampsell*, decided February 25, 1946, No. 142, Oct. Term, 1945. No such substantive determinations have been made by the circuit court of appeals, however, and no conflict with state law appears in its ruling.

4. Nor did the court below, in reaching its conclusion, depart from the decision of this Court in *Philadelphia Company* v. *Dipple*, 312 U. S. 168. That case held that taxes of the underliers could not be paid as expenses of administration of the estate. As the court below pointed out (R. 947), the case did not involve the public interest in maintaining the unified system. Nor did it concern the question of finding the method for terminating the protracted reorganization (R. 942). It was not inconsistent to recognize the formal

legal entities comprising the system as separate for tax purposes and to insist upon their unity for the different problems of plan jurisdiction. *Irving Trust Co.* v. *Kaminsky,* 22 F. Supp. 362 (S. D. N. Y.), citing *Corsicana National Bank* v. *Johnson,* 251 U. S. 68, 88, 89. Note, *Insolvency as a Requisite to Piercing the Corporate Veil,* 82 U. Pa. L. R. 868 (1934).

Furthermore, the Court in the *Dipple* case was concerned over the possibility of preferences in favor of certain underliers if taxes which it was sought to have the trustees pay on their behalf should exceed sums properly due them for use and occupation or for rent, for it recognized the great difficulty in apportioning system receipts among underliers in ratio to their contribution to the enterprise. 312 U. S. at 174. Some effort to ascertain the individual underliers' contribution to the enterprise must presumably be made before system earnings can be fairly distributed to them and in turn to their security holders, and the proposed systemwide plan in fact represents an attempt at such a determination (R. 573–575). The various theoretical alternatives outlined above (pp. 19 *ff.*) fail to achieve this result, while one such method—negotiation for reduced intercorporate obligations and the binding of dissenters by the entry into reorganization of successive tiers of underliers—is, apart from obvious difficulties, rife with the possibility

of preferences. Jurisdiction for a systemwide plan, rather than contravening *Philadelphia Company* v. *Dipple*, actually carries out its intent.

CONCLUSION

The petitions for writs of certiorari should be denied.

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